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SUPREME COURT

OF THE UNITED STATES.

WILLIAM B. DINSMORE, AS PRESIDENT OF THE ADAMS EXPRESS COMPANY, AND A SHAREHOLDER THEREIN, *Appellee,*

vs.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *Appellant.*

No. ~~994.~~ 55

TRANSCRIPT

TO BE USED ON HEARING OF

MOTION TO DISMISS APPEAL, OR FOR CERTIORARI.

TOPEKA, KANSAS:
KANSAS PUBLISHING HOUSE.
1882.

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In the Circuit Court of the United States,

FOR THE DISTRICT OF KANSAS.

IN EQUITY.

To the Judges of the Circuit Court of the United States for the District of Kansas:

William B. Dinsmore, a citizen of the State of New York and a resident therein, as the president of the Adams Express Company, and a shareholder therein, brings this his bill of complaint against the Missouri, Kansas & Texas Railway Company, a corporation created according to the laws of the State of Kansas, and owning and operating a line of railway as a public highway within said State; and thereupon your orator complains and says:

I. Heretofore, and in the year 1839, one Alvin Adams, then of Boston, Mass., originated, and subsequently, with the plaintiff as his partner, under the firm-name of Adams & Co., perfected the means not theretofore adopted by any existing common carrier, for collecting, transporting and delivering over public routes and highways, and by means of railways and steamboats, moneys, bank bills, coin, bullion, bonds and securities of every kind and nature, packages containing articles of greater or less value, as contradistinguished from ordinary freight, and the collection and remission of proceeds

of unpaid bills and accounts, and devised and constituted the means, checks and safeguards necessary for the safe transportation and transmission thereof, and in so doing built up for the said Adams & Co. a large and valuable business and property therein; and which said business was transacted between the cities of Boston and New York, over the line of the Boston & Worcester Railroad Company and the steamboats running between Norwich and New York aforesaid. The said Adams & Co. thereafter extended their said business over the line of the Camden & Amboy Railroad Company from the city of New York aforesaid to the city of Philadelphia.

Subsequently thereto Edward S. Sanford, now a citizen of the State of New York, and then of the city of Philadelphia, and Samuel M. Shoemaker, now a citizen of the State of Maryland, then of the city of Baltimore, organized and perfected the means for conducting a similar business between the cities of Philadelphia and Baltimore, and which said business was subsequently extended from Baltimore to Washington, over the Washington Branch of the Baltimore & Ohio Railroad. By an arrangement between the said parties, the business of the said Sanford and Shoemaker was united with that of the said Adams & Co., and thereafter was by them extended from Philadelphia to Pittsburg by the railways and canals then operated between said cities.

At or about the same time, Johnston Livingston, now a citizen of the State of New York, was engaged in conducting a similar business, also between the cities of New York and Philadelphia.

The firm of Harnden & Co. was also then engaged in conducting a similar business between Boston and New York, by the way of Providence, and from New York to Albany, and from Boston to Albany, by means of the railways and

steamboats then in use between said cities. The said firm of Adams & Co. purchased the business of the said Harnde & Co.

At or about the same time, Daniel Phillips and Clapp Spooner, both now citizens of the State of Connecticut, were engaged in the conduct of a similar business between the cities of New York and Hartford, over the line of the New York & New Haven Railroad Company; and James M. Thompson, now a citizen of the State of Massachusetts, was likewise so engaged over the line of the Hartford & Springfield Railroad Company between the cities of Hartford and Springfield; and Robert F. Weaver and Stephen O. Potts, both now citizens of the State of Pennsylvania, were also engaged in the conduct of a similar business between the cities of Philadelphia and Reading, over the railroad then existing between the same.

Neither the railway nor the steamboat companies then or now existing had ever undertaken or held themselves out to the public as ready to undertake the conduct of the business aforesaid, nor had the right to conduct the same been always accorded to such companies by the several charters under which such companies were organized. The conduct of such business involved the collection from the consignors and the delivery to the consignees of the property transported, its absolute protection while in transit, and a pecuniary responsibility primarily liable to the owner in case of loss, which it was not within the usage or the ability of the said railway and steamboat companies to make and give.

The business aforesaid so organized and perfected was known from the commencement, and is now known, as the "Express Business," and the persons, firms, or corporations engaged therein have always been known, and now are known as "Express Companies."

From the commencement of the transaction of the express business, and until the present time, all the principal railway, steamboat and steamship companies of the United States have recognized the identity of the express business, the distinction which existed between the same and the common carriage of goods, wares and merchandise; have always extended to the express companies all needful facilities for the transportation of the property committed to their care; have always afforded transportation for the representatives of the express companies having charge of the property in transit so committed to their custody, and have always exacted and received from the express companies an indemnity against damage by reason of the loss of, or injury to, such property while so in transit.

II. On the first day of July, 1854, the said Adams & Co., composed as aforesaid, of the said Alvin Adams and this plaintiff; the said Edward S. Sanford; and the said Samuel M. Shoemaker; the said Johnston Livingston; the said Daniel Phillips and Clapp Spooner; the said James M. Thompson, and the said Robert F. Weaver and Stephen O. Potts, with the other parties interested with them, united in a joint and common undertaking and concern, all their various several express lines and the business appertaining thereto, and by so doing then and there formed a new organization or company, called from that date and now, "The Adams Express Company." The interest of all the parties so contributing to the formation of said new organization in the property so by them contributed was thereafter held by them jointly and in common, and was divided into 12,000 shares, to which no pecuniary value was assigned, and which said shares were apportioned among the parties aforesaid, and have usually had and now have a market value of not less than $100 per share. The said Alvin Adams subsequently died.

III. All of the nine persons so as aforesaid named, including this plaintiff, have been since the said first day of July, 1854, and now are, holders of shares in the said Adams Express Company. The number of shares in said company has been from time to time increased, and now is 120,000, of the market value aforesaid.

The holders of said shares now exceed 2,500 in number, and are all now citizens and residents of the United States, but no one of said shareholders is a citizen of, or resident in, the State of Kansas, and said 2,500 shareholders are too numerous to be joined as co-plaintiffs herein.

IV. The Adams Express Company, since the date of its association, has always had, and now has, its principal office and principal place of business in the city of New York, and its books and assets are there kept, and the meetings of its managers are there held, and it has never had, nor does it now have, a principal office or place of business in any other city.

V. On the sixth of May, 1880, the Legislature of the State of New York passed an act, which is still in force, and which, among other things, contained as follows:

"An action or special proceeding may be maintained by the president or treasurer of an incorporated association consisting of seven or more persons, to recover any property, or upon any cause of action, for or upon which all the associates may maintain such action or special proceeding, by reason of their interest or ownership therein, either jointly or in common. * * * Any partnership or other company of persons, which has a president or treasurer, is deemed an association within the meaning of this section. * * * The death or legal incapacity of a member of the association does not affect an action or special proceeding brought as prescribed in the last section. If the officer by whom it is

brought dies, is removed, or resigns, or becomes otherwise incapacitated, during the pendency thereof, the court must make an order directing it to be continued by his successor in office, or any other officer by whom it might have been originally commenced."

VI. The plaintiff now here brings into court the said statute.

VII. In the year 1856 the plaintiff was chosen and selected as the president of the Adams Express Company, and from that time until the present he has been and is now such president. All suits which, since such selection, have been brought in the State of New York by the said company have been brought by it in the name of this plaintiff, as such president, and, with but few exceptions, all suits against such company so there brought have been brought against this plaintiff as such president. In some few excepted cases, suits have been there brought against the then treasurer of said company.

VIII. This plaintiff is advised and believes that this court will, upon principles of comity, permit him to maintain this action, under the statutes aforesaid, as such president as aforesaid, for the relief hereinafter demanded; and that if such principles of comity do not prevail, then that this court will permit the plaintiff to maintain this suit, and in that event he therefore brings the same, in his own name, and on his own behalf, as a shareholder in said Adams Express Company as aforesaid, and as a representative of, and on behalf of, all the other shareholders, who are a body too numerous to be joined as co-plaintiffs having a common interest in the organization aforesaid.

IX. The Adams Express Company, having so as aforesaid assumed that name as the name of its organization, has by such name thence hitherto been known, and is now known,

and by such name, and in accordance with the usage obtaining in its business and with the public, has been known and contracted with, and sued, in many of the States of the Union.

X. After the formation of the Adams Express Company, various other express companies were formed for the conduct of the same general business, to be operated in like manner over the public thoroughfares of the country. As the principal railway lines known as "trunk lines," and running in a general direction from east to west, ran in courses generally parallel, the principal express companies existing at the early date aforesaid, namely, the "Adams," the "American," and the "United States," agreed among themselves that they would reach the commercial centers of the country by different railway and steamboat routes, and that they would divide the north and south express business in a manner best calculated for the welfare thereof, and for the best service of the public.

This understanding was generally effectuated, but, in various instances, two express companies have, at the same time, and with permission of the railway company, occupied, for a greater or less distance, the same line of railway, and such occupation has not been found incompatible with the harmonious working of such two express companies, and has resulted in a larger income to the railway company than it would have received had its line been occupied but by one express company only, and has also afforded the public the opportunity, both upon short and long routes, for the most efficient service, and for the competition to which it is lawfully entitled.

XI. Under the mutual understanding aforesaid, the Adams Express Company, as soon as the demands of the public warranted the expenditure, extended its business westward to

the cities of Wheeling, Columbus, Cincinnati, Indianapolis, Louisville and St. Louis, by means of the facilities afforded by the Pittsburgh, Cincinnati & St. Louis Railroad, and other companies, and thereby made the routes of the said Adams Express Company continuous from Boston, New York, Philadelphia and Pittsburgh, to the cities last aforesaid, and such continuous routes are now operated by it.

XII. The said Adams Express Company, under the arrangements and understandings aforesaid, extended its business in a southerly direction, and as the word "express" imports, always by the shortest line of communication to all the principal cities in the South, namely, Richmond, Charleston, Savannah, Mobile, Montgomery, New Orleans, Memphis and other places, and in so doing was always afforded by those occupying the public office of a common carrier all necessary facilities therefor, and which facilities were by said carriers increased to the said Adams Express Company in proportion with the increase of the demands of the public therefor.

XIII. The Adams Express Company has always, in the conduct of its business, paid, and now pays to the common carriers whom it employs, a just and reasonable compensation, satisfactory to them, for the facilities afforded, and has itself always charged the public only a just and reasonable compensation for the express services performed for it.

XIV. In the conduct of its business as aforesaid, the Adams Express Company has always represented, and now represents, that portion of the public which desires to avail itself in the transmission of its property and valuables, of the pecuniary responsibility of the express company, and of the safeguards and checks which it has originated, provided and enforced for the safe custody of the property committed to its care.

XV. The Adams Express Company conducted its business as aforesaid, until the commencement of hostilities, in 1861, when, by reason of the derangements of commercial intercourse then ensuing, and for other controlling reasons of a public character then generally known, it was obliged to discontinue its organization and business in the Southern States, and it thereupon withdrew from the same, and sold so much of its good will and its equipment as then there existed, to the Southern Express Company, a corporation created, as this plaintiff is informed and believes, under and pursuant to the laws of the State of Georgia; and, since then, the express business in the principal Southern States has been, and is now, conducted by the said Southern Express Company, under said charter, by which it is expressly authorized to conduct the same, and which said charter gives a legislative description of the kind and character of business to be done by said company as an express company, and to a copy of which the plaintiff craves leave to refer.

XVI. After the cessation of the hostilities aforesaid, an arrangement was made, and which is now in force, between the said Adams Express Company and the said Southern Express Company, for the general regulation of the transportation of property coming from the territory of the one into the territory of the other, and by which property received by the Adams Express Company, destined for points within the territory of the Southern, and property received within the territory of the Southern, destined to points within the territory of the Adams Express Company, or reached by its connections, is interchanged at certain specified points, and upon a basis of charge proportioned to the distance traversed in the territory of either. In case of such interchange of express matter within such territory, the express company originally receiving the same remains liable

to the public for the value thereof until delivered to the consignee.

XVII. Since the said understanding and arrangement, the Adams Express Company has made such interchanges with the said Southern Express Company, and now makes the same, at Richmond, Lynchburgh and Danville, Virginia; Chattanooga, Tennessee; Cairo, Illinois; and Paducah, Kentucky; and has not, itself, since then, either delivered or received express matter directly south of such points, but the territory so directly south thereof has been operated by the said Southern Express Company alone.

XVIII. Since the sale aforesaid to the said Southern Express Company, the Adams Express Company has been engaged, and is now daily engaged, in the conduct of its express business over the continuous routes between the cities above named and other places, and the residue of the express business of the country is now daily transacted by over 460 different express organizations, meeting the requirements of the public in the localities in which such business is transacted, and occupying therefor, without molestation and with the free permission of the railway companies, nearly every prominent railway line in the United States. Such express companies have, in the aggregate, as the plaintiff is informed and believes, an investment in capital and equipment of over $40,000,000, and such amount, as the plaintiff is also informed and believes, and therefore avers, is not incumbered by mortgage or other lien, and constitutes at all times a fund amply sufficient to secure the public against any probable loss of its property while in the custody of the express companies, and which security is not afforded, as the plaintiff is informed and believes, by any railway company in the United States.

In addition to such aggregated capital, thus furnished as

security to the public, the public is also furnished with the further security of the individual liability of all the copartners in the copartnerships engaged in the transaction of the express business, and the State of New York has repeatedly refused to withdraw from the public such additional security by the incorporation of the copartners then engaged in such business.

XIX. All of said express companies, as the plaintiff is informed and believes, have invested their capital and built up their business upon the express understanding with the railway companies that they would voluntarily afford all the facilities needed by the express companies as the representatives of the public for the transaction of its business, or upon the knowledge and belief that the public, whether demanding such facilities in its individual capacity, or through the express companies as its representative, had a legal right to compel the granting thereof by those who had been created by the public and for the public. No railroad company in the United States, to the knowledge of the plaintiff, has ever refused to transport express matter for the public upon the application of some express company, of some form of legal constitution. Every railway company, so far as the plaintiff is advised, has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created, of that class of matter which is known as express matter, and no railway company, to the knowledge of this plaintiff, has ever had the legal ability to assume, as between itself and the public, such obligations for the transportation of such matter as are universally assumed by the express companies toward all who treat them with frankness.

XX. Since the division of territory so as aforesaid made between the Adams and the Southern Express Companies,

the shares of the former have been so as aforesaid increased to 120,000, and it has from time to time extended its lines to meet the public requirements, and has now in daily use and occupation 21,216 miles of railway, operated by 4,297 employés, who make 911 daily trips, amounting to 64,560 miles daily, or 19,884,420 miles annually, for a compensation amounting to $1,568,730 annually, and at an expense to the said Adams Express Company for amounts paid for transportation to railway companies of $2,093,412 annually. The number of miles thus operated is divided among 155 different railway companies, 11 steamboat and 9 stage companies, and each of the same is now used by the said Adams Express Company as a vehicle of the inter-state commerce committed to its care and custody.

The principal public demand for the existence and use of an express company has been as a medium of exchange of money and the collection of negotiable securities and the transportation of express packages of greater or less value, or of packages the price or value of which was to be collected from the consignee at the time of delivery, and remitted to the consignor.

The public has always demanded in the transaction of its business of this character an undoubted financial responsibility on the part of the carrier, known integrity on the part of the employés, and the invention and application of all moral and mechanical safeguards which ingenuity and experience could devise or suggest. It has also required instrumentalities for the primary collection and subsequent delivery of express matter for the relief of the public generally in that regard. This demand has been made with full knowledge on the part of the public of the capacity and responsibility of existing railroad, steamboat and stage companies, and was

and always has been a demand for facilities and security which those companies did afford.

XXI. The Government of the United States, as the representative of the public, has for the reasons aforesaid availed itself of the facilities and security afforded by the express companies to an extent sometimes larger and almost always equaling the demands of the general public. The Adams Express Company safely carried and delivered for the Government in the year 1878 $1,200,000,000, and in the year 1879 $661,000,000. During the same year (1879,) it carried for the general public the sum of $1,050,000,000, which it received and disbursed at 3,000 different offices. The laws of the United States now in force permit the use of the mails for the transportation of moneys and of many articles which are known as express matter, at what are called "third-class rates," and the railway companies of the country, unless forbidden by their charters, have also instrumentalities for the transportation of moneys and securities from point to point; but neither the Government of the United States nor the public generally have ever used, to any appreciable extent, either the mail or railway facilities for the transmission of such moneys and securities. The express companies have been created by the public as their instrumentalities for the transmission as well of public as of private moneys, as aforesaid, and the necessity for the existence of such instrumentalities is as great as the necessity for the existence of the ordinary vehicles of commercial intercourse. In addition to the amounts of money above stated, the Adams Express Company has daily received and transmitted from its New York office over 14,000 packages of express matter; and it daily employs, in making its primary collections and subsequent deliveries, over 918 horses, with the necessary wagons therefor.

XXII. The defendant, the Missouri, Kansas & Texas Railway Company, was incorporated by the State of Kansas, and received material aid therefrom, and from the Government of the United States, under and pursuant to the several statutes in Schedule A, hereto annexed, and hereby made part hereof, and which said statutes the said plaintiff now here brings into court as part of this, his bill, and under which the said defendant has been and is now engaged in operating a line of railway for the conveyance of passengers, goods, wares and merchandise, and express matter, between, among other places, Fort Scott and Parsons and Junction City, in said State of Kansas, and between the same and other places in the States of Missouri and Texas, and in the Indian Territory south of said State of Kansas; and the incorporation of the said defendant has also, as this plaintiff is informed and believes, been granted or confirmed by said States of Missouri and Texas. The plaintiff craves leave to refer, if necessary, to the statutes of the said States of Missouri and Texas.

XXIII. On the 23d day of November, 1871, the defendant and the said Adams Express Company entered into an agreement in reference to the enjoyment by the latter of all needful railway facilities on the railway line of the former, and which agreement was in writing, and was signed by the parties, and was in the words and figures following, to wit:

"This agreement, made this twenty-third day of November, A. D. 1871, between Missouri, Kansas & Texas Railway Company, by R. S. Stevens, its General Manager, party of the first part, and the Adams Express Company, by ——, party of the second part, witnesseth:

"The Missouri, Kansas & Texas Railway Company, as owning and controlling the following lines of road—viz., from Junction City, in the State of Kansas, and from Sedalia,

in the State of Missouri, to Parsons, in Kansas, thence southerly to a crossing of the Arkansas river, and from Holden, Mo., on the Missouri Pacific Railroad, westerly to Paola, on the Missouri River, Fort Scott & Gulf Railroad, total length, say, four hundred and seventy-three miles—will permit the Adams Express Company to do an express business over its lines of road on the following terms and conditions:

"1. The Missouri, Kansas & Texas Railway Company will furnish for the use of the Adams Express Company, one car each way on its line from Sedalia, Missouri, via Parsons, Kansas, to Junction City, Kansas, to be hauled on a passenger train each day that a passenger train is to run over the line; the car to be used exclusively by the Adams Express Company, but not to carry at any one time an excess of seven tons of freight; the charges by the express company to its patrons to be not less than one and one-half first-class rates of the Missouri, Kansas & Texas Railway Company at the time, as per its freight tariff. The railway company will also furnish, from Parsons south to the Arkansas river, the necessary accommodations in its baggage car, and also similar accommodations in a baggage car on the Holden line on one train each way. The express car, as well as all express matter carried over the road in any baggage or other car, to be in charge of one agent or messenger of the express company on each train, who is to be carried free.

"2. All express matter from points on or north of the Missouri Pacific Railroad, and all that comes from any point beyond or east of St. Louis, *via* that city, for points on the line of the Missouri, Kansas & Texas Railway or beyond, is to be brought on the said line at Sedalia, and no business for this road is to be done, or freight of any kind to be received or delivered, at Vinita, except such as originated at or

is destined to points on the Atlantic & Pacific Railroad south and west from Franklin, Missouri.

"3. As part compensation to the railway company for the privileges furnished by it, as herein provided, the express company will pay to the railway company monthly one hundred dollars per day for each and every day that trains are run over the railway or any part thereof.

"4. As part consideration, it is also agreed that the express company shall carry the money and valuable packages belonging to the railway company over the line of the Missouri, Kansas & Texas Railway free of charge, and for all matter going to or coming from points beyond the line of the Missouri, Kansas & Texas Railway, the express company will charge not exceeding two-thirds of its regular rate for such business. The superintendents and agents for said express company, whenever it is necessary to supervise the business, to have the privilege of traveling over the line of said road free; passes for such free passage to be furnished on application of the superintendent of the express company for this division.

"5. The railway company agree, further, that they will not carry freight or packages for pay in their baggage cars on passenger trains, nor allow their conductors or baggage-masters or other employés to do so, during the existence of this agreement, nor will they allow any other company, firm, or person the privilege of carrying freight on their passenger trains at any less rate of payment per day, or any greater weight in a car, or upon any better terms in any way than is granted to said express company under this agreement.

"6. It is understood that as the line of the Missouri, Kansas & Texas Railway is extended south from the Arkansas river, similar accommodations will be furnished for an express business, as herein above provided, at a reasonably in-

creased cost, to be paid by the express company, as shall hereafter be agreed upon.

"7. This agreement to take effect on the first day of December, A. D. 1871, and continue in force for one year thereafter, and until thirty days' notice shall have been given to the other by the party desiring to terminate same.

"In witness whereof, the parties hereto have signed this agreement the day and year first above named.

"THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
Per R. S. STEVENS, *General Manager.*"

XXIV. This plaintiff further avers that since the execution of the said contract, the Adams Express Company has been in the enjoyment of the facilities described therein, and has been daily in the use thereof, over the line of the defendant's railway, between the points in said contract mentioned, and, with the permission of the defendant, has extended the same southward to Denison, Texas, where it has interchanged express matter with the Texas Express; and that it has also interchanged express matter in the State of Kansas, at various points on the line of the defendant's railway, with the American, United States, and the Pacific Express Companies; and that the said line of the defendant constitutes the only link of inter-state express communication occupied by the Adams Express Company for its Eastern and Western through business, and also constitutes a link in the express communication now had by the said Adams Express Company, between the points on the line of the said defendant's railway and points west thereof in the State of Kansas aforesaid, and also in the State of Colorado.

XXV. This plaintiff further says, that the compensation paid by the said Adams Express Company in said contract specified, was nominated and prescribed by the said defendant

as a just and reasonable compensation to be demanded and received by it, and that the said Adams Express Company has paid the same, and has paid in the aggregate therefor the sum of $446,598.16; and that it is ready and willing, and hereby offers to continue to pay such part thereof, or such other just and reasonable compensation as the said defendant may be entitled to demand and receive for a continuation of such facilities as are in such contract specified, or as may be needful for the Adams Express Company to have, possess and enjoy in the conduct of its business as aforesaid, and as the agent and representative of the public therein.

XXVI. This plaintiff further avers, upon information and belief, that subsequently to the making of the said contract, the said defendant's railway was, by a proper proceeding taken in the United States Circuit Court, placed in charge of a receiver, and that during the possession thereof by such receiver, the said Adams Express Company had and enjoyed all the facilities on the line of the said defendant's railway in said contract specified, and needed by the said Express Company for the transaction of its business as aforesaid.

XXVII. This plaintiff further avers, upon information and belief, that on the 1st day of December, 1880, the said defendant caused to be issued a notice, in the words and figures, to wit:

"MISSOURI, KANSAS & TEXAS RAILWAY CO.,
PRESIDENT'S OFFICE, NEW YORK, Dec. 1, 1880.

"This company, by decree of the United States Court, having assumed charge of its railway, leased lines and appurtenances, Mr. A. A. Talmage is hereby appointed general manager, and will at once proceed to take charge of the same. JAY GOULD, *President.*"

This plaintiff further avers, that on the 1st day of Decem-

ber, 1880, the said defendant caused to be addressed and sent to the said Adams Express Company, a notice in the words and figures following, to wit:

"MISSOURI PACIFIC RAILWAY COMPANY,
GENERAL SUPT'S OFFICE,
ST. LOUIS, Dec. 1, 1880.

(A. A. TALMAGE, *General Supt.*)

J. H. RHODES, ESQ., *Supt. Adams Express Co.*—*Dear Sir:* By direction of the president, I have this day taken charge of the Missouri, Kansas & Texas Railway, its leased lines and branches. I desire to notify you that on the 1st day of January, 1881, your company will be expected to retire from the operation of the express business on this road, as on and after that date the business will be done by and for the railroad company.

"Yours truly,

"A. A. TALMAGE, *General Manager.*"

And which said notice was given, as this plaintiff believes, under and pursuant to the provisions of the seventh paragraph in the above recited contract in these words:

"This agreement to take effect on the first day of December, A. D. 1871, and continue in force for one year thereafter, and until thirty days' notice shall have been given to the other by the party desiring it to terminate the same."

XXVIII. As the plaintiff is informed and believes, the said Jay Gould, by whom said notice of the 1st of December, 1880, is signed as the president of the said defendant, is also largely interested in the ownership and management of a number of other railways, which in the aggregate are popularly known as "The Wabash System," and that all of the railways comprised in said system have granted to the Pacific Express Company, a corporation created according to the laws of the State of Nebraska, all needful railway facilities

for the conduct of the express business over the lines of railway embraced in such system, and which said Pacific Express Company is now daily engaged in the conduct of the express business on such lines.

XXIX. This plaintiff further avers that it is the purpose of the said defendant, and that it intends on the 1st day of January, 1881, to exclude and eject the Adams Express Company, its messengers and business, from its line of railway, and from its cars, depots, and stations, and that, unless restrained by the order of this court, it will carry such intention on said date into practical effect, and will thereafter refuse to the Adams Express Company, and to the public employing it, the facilities heretofore granted for the transaction of express business, and that if such intention is so carried into effect, so much of the public as has heretofore employed, and is now employing, the Adams Express Company, will be deprived of the right to have its express matter transported, as it has heretofore been, over the railway lines of the defendant, and as the shortest through line between New York and Denison, Texas, occupied by the said Adams Express Company, and that the said company will thereby sustain great and irreparable injury to its good will, reputation, business, and property.

XXX. This plaintiff further avers, as he has hereinbefore averred, that the Adams Express Company, in the conduct of its business generally, and over the defendant's line, is acting solely as the agent and representative of the public; that the said company does not own the property committed to its charge; that the title thereto is in the shippers or consignees thereof; that said consignees and shippers reside in almost every State in the Union; and that they employ the Adams Express Company to perform, and demand such services in

respect to the express matter committed to the charge of said company, as such owners or shippers may desire.

XXXI. This plaintiff further avers that successive actions at law, to be brought upon daily tenders of express matter to the said defendant, and its daily refusals to transport the same, would involve the Adams Express Company in a multiplicity of litigations, which it has not the ability to institute or to prosecute on every occasion and in every county when and where such tenders and refusals should take place; and that such litigations would be valueless in point of recovery to the said Adams Express Company, and would not protect its right on behalf of the public to have its express matter continuously carried for a just and reasonable compensation; and that such exclusion and ejectment, if it is permitted to take place, will not present the case of a single and temporary disturbance of the business of the Adams Express Company, but from its very nature will constitute a permanent, perpetual and irreparable injury thereto, and the entire loss, within the localities designated, of its good will, business, reputation and property therein, and would within the same localities permanently prevent it from accomplishing for the public the specific objects for which the said Adams Express Company was organized and perfected; and that the said Adams Express Company is remediless in the premises at and by the course of the common law, and that the common law does not and cannot afford so adequate and perfect a remedy herein as it is within the jurisdiction and province of a court of equity to afford.

XXXII. This plaintiff further says, upon information and belief, that it is the intention of the said defendant to accord to the said Pacific Express Company, on the first day of January, 1881, the sole and exclusive enjoyment of the facilities on its line and needed for the conduct of the express business

thereon, and such as have been heretofore accorded under the said contract, and by the usage and custom of the defendant thereunder, to the said Adams Express Company.

XXXIII. This plaintiff further says, that if it is not the intention of the said defendant so to accord such facilities to the said Pacific Express Company, then that it is the intention and purpose of the said defendant to exclude and eject the said Adams Express Company from the cars, lines, depots, and stations of the said defendant on and after the 1st day of January, 1881, and thereafter to undertake the exclusive conduct of the express business on its own behalf and in its own name, and to refuse to recognize any right of the Adams Express Company to have and enjoy a continuation of the express facilities heretofore accorded to it, and to exclude it from any participation therein.

XXXIV. And this plaintiff further says, as he is advised and believes, and therefore charges, that the said defendant is a public corporation, created by the Legislature of the State of Kansas, by aid of material assistance afforded by it and its municipalities for the public good, and that its charter imposes upon it the duties and obligations of a common carrier, and that among such duties and obligations is the duty of receiving and carrying express matter and freights for all persons upon the same and equal terms; and that such duty is due to every citizen, and in an equal measure to each; and that the public has a correlative right to demand and receive transportation for all of its express matter, whether tendered personally or by a representative, upon the same terms and conditions as such matter and freights are carried for others; and that the defendant has no lawful right to refuse to perform its duties or to discharge its obligations in this regard, but is bound to serve all with indifference and equal readiness, and cannot consent to carry for one and refuse to carry

for another, or exercise, either directly or indirectly, unreasonable discrimination in terms, facilities, or accommodations, or deprive any portion of the public of its common right in that regard.

XXXV. The plaintiff further says, as he is advised and believes, and therefore charges, that the said exclusive contract between the said defendant and the said Pacific Express Company, if made, is, or if about to be made, will be, violative of the duties and obligations of the said defendant; inconsistent with the rights of the public; will prevent lawful competition in business; will be in restraint of trade, and will create a monopoly, and will be void at the common law; and constitutes no legal or reasonable ground for the threatened exclusion and ejectment of the Adams Express Company from the railway lines of the said defendant.

XXXVI. This plaintiff further avers, as he is informed and believes, that if the said defendant undertakes, on and after the 1st day of January, 1881, to conduct the express business as such business has been practically defined by the demands of the public in relation thereto, it will so undertake the same without lawful or charter authority therefor, and without legal right to a monopoly thereof, or to the sole and exclusive enjoyment of its railway facilities in the conduct thereof, and that in such event the said Adams Express Company will still have, as representing the public as aforesaid, legal rights in the premises to be protected by this court, by its decree to be made herein, and that it will be entitled to demand and to receive from the said defendant, and at a compensation not exceeding the cost thereof to it, the same facilities and accommodations for transacting the express business over the lines of the said defendant's railway as may be accorded by the said defendant to itself, and that it will be entitled to have all its express matter transported over the

lines of the said defendant's railway on the payment of the cost of such transportation, or at such rates for freight or toll as may be just and reasonable, and not in excess of those authorized by law, and upon the same trains, and with like accommodation thereon, and at depots and stations, as the said defendant may accord to itself in the transportation of such express matter as it may carry, and with a reasonable deduction therefrom as a just compensation for the accessorial service rendered by the said Adams Express Company on, beyond and off the lines of the said defendant, in the collection of express matter from shippers or consignors, and the delivery of the same to consignees, and the custody thereof, by means of messengers, horses and wagons, as is hereinbefore set forth, and which accessorial service the said Adams Express Company does not need or require at the hands of the said defendant, but is now performing and rendering for itself, as hereinbefore set forth.

XXXVII. The plaintiff further, in the event that the said defendant, during the pendency of this suit, undertakes to conduct, and does conduct for itself, the express business over its said lines of railway, hereby offers to comply with all the proper rules and regulations of the said defendant in reference to the conduct of said business, and is willing and ready, and hereby offers to pay all the reasonable compensation, freight, or toll which the said defendant railway company may lawfully demand for the transportation of express matter and the continuation of the needful railway facilities as aforesaid therefor.

XXXVIII. This plaintiff further says, that the said Adams Express Company is now in the possession of the good will of its customers, and is daily occupied in the conduct of its business over the lines of the said defendant's railway, and that it will irreparably injure the business of

the said Adams Express Company if said company shall be ejected or excluded from the lines of the defendant's railway, even in the event of the said defendant's undertaking hereafter to conduct its own express business, and that there is no legal or practical necessity for any exclusion of the said express company from the lines of railway of the said defendant, the said express company being willing and offering to pay as last aforesaid.

XXXIX. This plaintiff further says, as he is advised and believes, that the said defendant is a public corporation, operating a public highway, and a common carrier under the laws, statutes and charter aforesaid, and exercises thereunder a public office for the public good, and that as such it is amenable to the jurisdiction of a court of equity, and that such courts are always open and ready to exercise their powers for the purpose of compelling such corporations and common carriers to keep within the limits which the Legislature has thought proper to prescribe for the exercise of their powers, and not to exercise powers beyond those which their acts of incorporation confer, and to proceed by injunction to prevent illegal injury or destruction to the rights or property of others, and to prevent the execution of illegal contracts, or illegal exclusion from the enjoyment of public rights, and to protect all such rights in their fullest extent against all and every injury thereto, and that this court has power to protect the said Adams Express Company in the premises, and to compel the said defendant to exercise absolute impartiality toward all who desire accommodations upon its railway lines.

XL. Wherefore, this plaintiff prays—

1. That a preliminary or provisional injunction may be issued against the defendant, its agents, officers, servants and employés, restraining them, and each of them, until the fur-

ther order of this court, and particularly on the 1st of January, 1881, and on any other day prior or subsequent thereto, from interfering with or disturbing in any manner the enjoyment by the Adams Express Company of the facilities now accorded to it by the said defendant upon its lines of railway for the transaction of the business of the said Adams Express Company, and of the express business of the public confided to its care; and from interfering with any of the express matter or messengers of the Adams Express Company; and from excluding or ejecting any of its express matter or messengers from the depots, cars and lines of the said defendant, as the same have been heretofore, and are now, enjoyed and occupied by the said Adams Express Company; and from refusing to receive and transport, in like manner as the said defendant is now doing, and as heretofore done over its lines of railway, the express matter and messengers of the said Adams Express Company; and from interfering with or disturbing the business of the said Adams Express Company, or its present relations in reference thereto, with the said defendant, in any way or manner whatsoever; and, so long as the said Adams Express Company shall be willing and ready, and offer to pay according to its present contract rates with the said defendant, or such rates as shall be equal to those paid by others who are afforded the same facilities, or for such compensation as shall be equal to the cost thereof, and during the pendency of this action, not in excess of the aforesaid contract price.

2. That the said defendant may be adjudged and decreed to receive for transportation the express matter and messengers of the Adams Express Company at all its depots and stations, and to transport the same to destination, without molestation or hindrance, upon the same terms as to compensation for freight or passage money, and by the same train

that it receives and transports express matter and messengers for the Pacific or any other express company, and that it may be adjudged and decreed that the said defendant has no lawful right to make any contract of any kind with any person, firm, or corporation, whereby it shall grant any rights, privileges, accommodations, or facilities over its lines of railway, which will prevent, or which may or can be alleged to prevent, the said defendant from granting the same or equal rights, privileges, accommodations, and facilities to the Adams Express Company, or to any other portion of the public desiring to have, occupy, enjoy, and possess the same, upon the same and equal terms as are offered by or afforded to any other person, firm, or corporation.

3. That the said defendant may be adjudged by this court to transport, at all times, the express matter and messengers of the said Adams Express Company, by the same trains and with the same accommodations thereon, and in its depots and stations, as it may transport its own express matter, or that it may accord to itself, and that the said defendant may be decreed to transport the said express matter of the Adams Express Company at and for a rate of compensation not in excess of the amount which it shall cost the said defendant so to transport the same, and to continue to accord the facilities aforesaid, and not in excess of the lawful freights and tolls which the said defendant may be authorized to charge, and that the said defendant may be decreed to make a reasonable rebate or reduction therefrom, to be fixed and determined by this Honorable Court, by reasons of the performance by the said Adams Express Company of said accessorial service as above specified.

4. That a permanent injunction may issue herein to the same purport and effect as is hereinbefore prayed in and to said provisional or preliminary injunction.

5. That the plaintiff may have such other relief, or such further or different relief, herein with his costs, as to this court may seem meet.

XLI. This plaintiff further avers that heretofore the Adams Express Company was in the enjoyment of all needful railway facilities upon the line of the Louisville, New Albany & Chicago Railroad Company, in the State of Indiana; of the Louisville, Cincinnati & Lexington Railway Company, in the State of Kentucky; of the Denver & Rio Grande Railway Company, in the State of Colorado; and of the Washington City, Virginia Midland & Great Southern Railway Company, in the State of Virginia, and which latter company was in the hands of a receiver, duly appointed in a mortgage foreclosure by a State court of competent jurisdiction in the State of Virginia; and that the said Southern Express Company was, in like manner, in the enjoyment of similar facilities upon the line of the Mobile & Montgomery Railway Company, in the State of Alabama; of the Nashville, Chattanooga & St. Louis Railway Company, and of the Louisville & Nashville Railroad Company, in the State of Tennessee; and of the St. Louis, Iron Mountain & Southern Railway Company, in the State of Missouri. Subsequently all of the said railroad companies, and the said receiver, gave notice that, on and after the day named, the express facilities theretofore accorded to the said Adams and Southern Express Companies would be withdrawn. Some of said companies assigned, as a reason for giving such notice, that they had made a contract for the future conduct of the express business, over their lines, with the Union Express Company, a corporation created according to the laws of the State of Kentucky. Such companies subsequently gave notice that said contracts with the Union Express Company had been canceled, and all of said companies gave notice, in substance,

thereafter, that the express business over their lines would be conducted "by and for the railroad company." The said receiver gave notice that he would thereafter conduct the express business as such receiver, on his own account and for his own benefit, and claimed that he was authorized so to do by the laws of the said State of Virginia, and that his rights thereunder were exclusive.

This plaintiff thereupon commenced a suit in equity in Circuit Court of the United States for the District of Indidiana, against the said Louisville, New Albany & Chicago Railway Company, and procured therein, *ex parte*, an order substantially in the form of Schedule B, hereto annexed and hereby made part hereof. He also commenced a liko suit in the Circuit Court of the United States for the District of Kentucky, against the Louisville, Cincinnati & Lexington Railway Company, and procured therein, *ex parte*, an order substantially like Schedule B. He also commenced a like suit in the Circuit Court of the .United States for the District of Colorado, and procured therein, *ex parte*, an order substantially like said Schedule B. He also filed a petition in said foreclosure suit, in said State Court, in said State of Virginia, praying that a preliminary injunction might issue therein, restraining the said receiver in the same manner and to the same extent as is hereinbefore prayed, and said preliminary injunction was granted, and the said receiver thereupon moved the court upon his answer to dissolve the same, and said motion was argued by counsel, and was denied. The others of said defendants in said suits appeared therein on the return day of said orders, and opposed by affidavit and argument the granting of the preliminary injunction as therein prayed, and the said injunctions were granted and are yet in force, and a copy of one of the same is hereto annexed, marked Schedule C, and hereby made a part hereof. Said

Adams Express Company, since the granting of the said injunctions, has been in the daily and undisturbed enjoyment of its express facilities theretofore enjoyed by it over said several lines of railway, and the defendants therein have also simultaneously been engaged in the conduct of an express business thereon.

Similar suits, as this plaintiff is advised and believes, were brought by the said Southern Express Company against the Nashville, Chattanooga & St. Louis Railroad Company and the Louisville & Nashville Railroad Company, in the Circuit Court of the United States for the Middle District of Tennessee, and against the St. Louis, Iron Mountain & Southern Railway Company in the Circuit Court of the United States for the Eastern District of Missouri, and similar preliminary orders were procured therein, and similar injunctions were obtained and issued therein, and the same yet and now remain in force, and said Southern Express Company is daily in the enjoyment of express facilities over the lines of said railways, and the said railways are also simultaneously engaged in the conduct of the express business thereon for their own account. The said Southern Express Company, as this plaintiff is informed and believes, commenced a like suit in the Circuit Court of the United States for the District of Alabama, against the said Mobile & Montgomery Railway Company, and procured therein an order substantially like Schedule B, and by consent such order has been continued and is still in force. The plaintiff refers to said several suits upon principles of comity, and he craves leave on like principles to refer to the records and to the opinions of said several courts pronounced therein.

To the end, therefore, that the said defendant may, if it can, show why your orator should not have the relief hereby prayed, and may under its corporate seal, and according to

the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated paragraph by paragraph, and it were specially interrogated thereunto severally, may it please your Honors to grant unto your orator a writ of *subpœna ad respondendum*, issuing out of and under the seal of this Honorable Court, to be directed to the said defendant, the Missouri, Kansas & Texas Railway Company, commanding it, on a certain day, and under certain penalty, to be therein inserted, to appear before your Honors in this Honorable Court, and then and there, full, true, direct, and perfect answer make to all and singular the premises; and, further, to stand to, perform, and abide by such further order or decree herein as to your Honors shall seem meet; and, also, a writ of provisional and a writ of perpetual injunction to the same tenor, purport, and effect, as is hereinbefore set forth and prayed.

And your orator will ever pray, etc.

WILLIAM B. DINSMORE,

As President of the Adams Express Company, and a Shareholder therein.

BY L. C. WEIR,

Also a Shareholder therein, and one of the officers of the Western Division of the Business of said Company, and a Citizen of the State of Ohio.

BLAIR & PERRY,
CLARENCE A. SEWARD,
F. E. WHITFIELD,

Solicitors, and of Counsel for Plaintiff.

Adams Express Company, since the granting of the said injunctions, has been in the daily and undisturbed enjoyment of its express facilities theretofore enjoyed by it over said several lines of railway, and the defendants therein have also simultaneously been engaged in the conduct of an express business thereon.

Similar suits, as this plaintiff is advised and believes, were brought by the said Southern Express Company against the Nashville, Chattanooga & St. Louis Railroad Company and the Louisville & Nashville Railroad Company, in the Circuit Court of the United States for the Middle District of Tennessee, and against the St. Louis, Iron Mountain & Southern Railway Company in the Circuit Court of the United States for the Eastern District of Missouri, and similar preliminary orders were procured therein, and similar injunctions were obtained and issued therein, and the same yet and now remain in force, and said Southern Express Company is daily in the enjoyment of express facilities over the lines of said railways, and the said railways are also simultaneously engaged in the conduct of the express business thereon for their own account. The said Southern Express Company, as this plaintiff is informed and believes, commenced a like suit in the Circuit Court of the United States for the District of Alabama, against the said Mobile & Montgomery Railway Company, and procured therein an order substantially like Schedule B, and by consent such order has been continued and is still in force. The plaintiff refers to said several suits upon principles of comity, and he craves leave on like principles to refer to the records and to the opinions of said several courts pronounced therein.

To the end, therefore, that the said defendant may, if it can, show why your orator should not have the relief hereby prayed, and may under its corporate seal, and according to

the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated paragraph by paragraph, and it were specially interrogated thereunto severally, may it please your Honors to grant unto your orator a writ of *subpœna ad rerpondendum*, issuing out of and under the seal of this Honorable Court, to be directed to the said defendant, the Missouri, Kansas & Texas Railway Company, commanding it, on a certain day, and under certain penalty, to be therein inserted, to appear before your Honors in this Honorable Court, and then and there, full, true, direct, and perfect answer make to all and singular the premises; and, further, to stand to, perform, and abide by such further order or decree herein as to your Honors shall seem meet; and, also, a writ of provisional and a writ of perpetual injunction to the same tenor, purport, and effect, as is hereinbefore set forth and prayed.

And your orator will ever pray, etc.

WILLIAM B. DINSMORE,

As President of the Adams Express Company, and a Shareholder therein.

BY L. C. WEIR,

Also a Shareholder therein, and one of the officers of the Western Division of the Business of said Company, and a Citizen of the State of Ohio.

BLAIR & PERRY,
CLARENCE A. SEWARD,
F. E. WHITFIELD,

Solicitors, and of Counsel for Plaintiff.

UNITED STATES OF AMERICA,
DISTRICT OF KANSAS, } ss.

On the 23d day of December, 1880, before me personally appeared L. C. Weir, to me known to be the person mentioned in and who has signed the foregoing bill of complaint, and he, being by me duly sworn, did depose and say, that he had read the foregoing bill and knew the contents thereof, and that the same was true to his own knowledge, except as to the matters therein stated to be on information and belief, and that as to those matters he believed the same to be true.

UNITED STATES OF AMERICA,
DISTRICT OF KANSAS, } ss.

L. C. Weir, being duly sworn, deposes and says:

I am a shareholder in the Adams Express Company, and a citizen of the State of Ohio. For eighteen years last past I have been connected with the western division of the business of said company. Such division includes the States of Ohio, West Virginia, Kentucky, Indiana, Tennessee, Illinois, Missouri, Kansas and Colorado, the Indian Territory, and the Territory of New Mexico. I have been connected with the said company since 1862, and am generally familiar with its business. I am generally cognizant of most of the statements, matters of fact and things in said bill contained, and the same are therein correctly set forth. I have in my possession the original letter of the defendant, of December 1, 1880, set forth in said bill, and I am personally familiar with the existence of the contract in said bill set forth, and of the conduct of the express business thereunder, and with the commencement of the various suits, and of the granting of the orders and injunctions in said bill set forth, and I know of my own knowledge that the restraining order and injunction in said bill set forth as having been granted by the Circuit Court of the United States for the District of

Indiana, was so granted upon a bill substantially like the foregoing, in the name of William B. Dinsmore, as President, etc., and which said bill was verified by Alfred Gaither, the then manager of the said western division, and a shareholder in the said Adams Express Company. I further say, that the only reason why this bill is not signed and verified by the said William B. Dinsmore in person is, that he resides and is now in the city of New York, and that there is not sufficient time between this date and the 1st of January, next, to send the same to the said Dinsmore for signature, verification and return, and to apply thereon for a similar restraining order against the defendant in said bill named.

I further say, that on the first day of December, 1880, the said Jay Gould, in said bill named, issued another circular, in the words and figures following, to wit:

[Circular.]

"THE MISSOURI PACIFIC RAILWAY CO.,
PRESIDENT'S OFFICE, NEW YORK, Dec. 1, 1880.

"Mr. A. A. Talmage is this day appointed general manager of this railway, its branches and leased lines. His order will be respected and obeyed accordingly.

JAY GOULD, *President.*"

I further say, as I am informed and believe, that after the receipt of the notice from the said defendant, as in paragraph XXVII of said bill set forth, application was made to the said defendant, to ascertain the purpose and intent of giving the said notice to the said Adams Express Company, and that the said defendant answered in substance that it was the intention of the said defendant hereafter to conduct the express business over its lines and in connection with the express business of the Missouri Pacific Railway Company, which said railway company connects with the lines of the said defendant

at Sedalia, in the State of Missouri. I further say that I am informed and believe that the express business upon the lines of the said Missouri Pacific Railway Company is now, and for some time past has been, exclusively conducted by the said Pacific Express Company, in said bill named.

L. C. WEIR.

Subscribed and sworn to before me, this 23d day of December, 1880.

A. P. SELBY,
U. S. Commissioner Eastern District Mo.

SCHEDULE B.

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF INDIANA.

WILLIAM B. DINSMORE, as President of the Adams Express Company, and a shareholder therein,

vs.

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY.

Upon the service upon this defendant of the subpena herein, and a copy of the bill as filed herein, and of the affidavit of Alfred Gaither thereto annexed, and of a copy of this order, let this defendant show cause before me, at ———, on the ——— day of ———, 1880, at —— o'clock — M., why a provisional or preliminary injunction should not issue herein, according to the prayer of the bill in that behalf, and why the plaintiff should not have such other, or such further or different relief, as to the court then there may seem meet.

In the meantime, and until the return day of this order, it is ordered that the said defendent, its agents, officers, servants, and employés be, and they hereby are by this order, severally restrained from interfering with or disturbing in any manner the enjoyment by the Adams Express Company of the facilities now accorded to it by the said defendant upon

its line of railway for the transaction of the business of the said Adams Express Company, and of the express business of the public confided to its care, and from interfering with any of the express matter or messengers of the Adams Express Company, and from excluding or ejecting any of its express matter or messengers from the depots, cars, and line of said defendant, as the same have been heretofore and are now enjoyed and occupied by the said Adams Express Company, and from refusing to receive and transport in like manner, as the said defendant is now doing over its line of railway, express matter and messengers of the said Adams Express Company, and from interfering with or disturbing the business of the said Adams Express Company, or its present relation in reference thereto with the said defendant, in any way or manner whatsoever, and from proceeding in any manner, on or after the 20th day of April, instant, to refuse to permit the Adams Express Company to continue the transaction of the said business over the lines of the defendant on the same terms and conditions as are or may be permitted to any other express company or individual for similar business.

Dated April , 1880.

Schedule C.

CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF KENTUCKY, AT LOUISVILLE, WEDNESDAY, MAY 26, 1880.

W. B. Dinsmore, as President of the Adams Express Company,

vs.

Louisville, Cincinnati & Lexington Railway Company.

INJUNCTION ORDER.

The motion of the complainant for a preliminary injunction herein, according to the prayer of the original and supplemental bill herein, having been brought on to be heard, and counsel for the respective parties having appeared and

been heard, and the court having duly considered the questions involved, does hereby order that a preliminary injunction issue herein, restraining the said defendant, its agents, officers and servants, during the pendency of this suit, from interfering with or disturbing in any manner the enjoyment by the Adams Express Company of the facilities now accorded to it by the said defendant upon its lines of railway, for the transaction of the business of the said Adams Express Company, and of the express business of the public confided to its care; and from interfering with any of the express matter or messengers of the Adams Express Company, and from excluding or ejecting any of its express matter, or messengers, or employés from the depot, cars, and lines of said defendant, as the same have been heretofore, and are now enjoyed and occupied by the said Adams Express Company, and from refusing to receive and transport in like manner, as the said defendant is now doing, over its lines of railway, express matter and messengers of the said Adams Express Company; and from interfering with or disturbing the business of the said Adams Express Company, in any way or manner whatsoever, and from refusing to permit the Adams Express Company to continue the transaction of its said business over the lines of the defendant, on the same terms, conditions, privileges, facilities, and accommodations as are or may be permitted or accorded to any other express company, or to or by the defendant itself, in the conduct of an express business over its railway lines, upon the payment by the said Adams Express Company of all lawful and reasonable charges which may be properly demanded by the said defendant, or paid by such other express company, or by the public, to the defendant therefor, not in excess of the rates authorized by its charter, and not in excess of the rates charged to others for similar services, and not in excess of the rates charged and

received by the defendant from shippers of express matter, to be carried by the defendant, as such; in the last case, less the reasonable cost of the accessorial service rendered off the railway lines and at the stations and on the trains of the said defendant, and with liberty to the parties to make such further application herein to the court as they may be advised is necessary to fix what is and shall be a lawful or reasonable compensation, or for any other matter growing out of the case. In the event of a dispute between the parties pending a preparation of this cause, as to what is reasonable compensation for the services performed by the defendant company for complainant, and what is a reasonable rebate to be allowed by the defendant for said accessorial service, such difference shall be referred to the court, after due notice, and pending such reference the complainant shall not be disturbed by the defendant in the transaction of express business over its line.

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF KANSAS.

WILLIAM B. DINSMORE, as President of the Adams Express Company, and a shareholder therein,

vs.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

Upon the service upon this defendant of the subpœna herein, and a copy of the bill as filed herein, and of the affidavit of L. C. Weir thereto annexed, and of a copy of this order, let said defendant show cause before me, at my chambers at Topeka, Kansas, on the fifth day of January, 1881, at ten o'clock A. M., why a provisional or preliminary injunction should not issue herein according to the prayer of the bill in that behalf, and why the plaintiff should not have such other or such further or different relief as to the court then and there may seem meet.

In the meantime, and until the return day of this order, it is ordered, that the said defendant, its agents, officers, servants,

and employés be, and they hereby are, by this order severally restrained from interfering with, or disturbing in any manner, the enjoyment by the Adams Express Company of the facilities now accorded to it by the said defendant upon its lines of railway for the transaction of the business of the said Adams Express Company, and of the express business of the public confided to its care; and from interfering with any of the express matter or messengers of the Adams Express Company, and from excluding or ejecting any of its express matter or messengers from the depots, cars, and lines of said defendant, as the same have been heretofore, and are now, enjoyed and occupied by the said Adams Express Company, and from refusing to receive and transport in like manner, as the said defendant is now doing, and as it has heretofore done, over its lines of railway, express matter and messengers of the said Adams Express Company; and from interfering with or disturbing the business of the said Adams Express Company, or its present relations in reference thereto with the said defendant, in any way or manner whatsoever, and from proceeding in any manner, before or on or after the 1st day of January, 1881, to refuse to permit the Adams Express Company to continue the transaction of the said business over the lines of defendant on the same terms and conditions as are or may be permitted to any other express company or individual for similar business, or as may be accorded or allowed by the said defendant to itself in the event that it shall engage in the conduct of the express business on its own account.

C. G. FOSTER, *Judge.*

SCHEDULE A.

We, whose names are hereunto subscribed, viz., Robert McBratney, James R. McClure, and S. M. Strickler, of Davis county; T. S. Huffaker, M. Conn, G. M. Simcock, R. B. Lockwood, of Morris county; E. Goddard, R. H. Abraham,

P. B. Maxson, J. H. Watson, G. R. Harper, Peter Harvey, M. M. Baker, of Lyon county; John T. Cox, H. Kelly, F. W. Potter, S. S. Prouty, J. B. Scott, A. V. Coffin, of Coffey county; N. S. Goss, Isaac W. Dow, and James Crane, Woodson county, do hereby associate ourselves together as a railroad company, under the act of the Legislature of the State of Kansas, entitled "An act to provide for the incorporation of railroad companies," approved February the 13th, A. D. 1865, to be known as the "Union Pacific Railway Company, Southern Branch."

The object of this association shall be the construction of a railway commencing at or near Fort Riley, or the junction of the Republican and Smoky Hill forks of the Kansas river, and on the line of the Union Pacific Railway, E. D., running thence via Clark's creek and the Neosho river to a point at or near where the southern boundary line of the State of Kansas crosses the said Neosho river.

The ultimate object of this association being to secure the construction of a continuous line of railway from the points above named, via the Arkansas and Red rivers, to the city of New Orleans, in the State of Louisiana.

The capital stock of this association shall be one million of dollars, divided into shares of one hundred dollars each.

In testimony whereof, we hereunto subscribe our names.

R. McBratney.	J. McClure.
S. M. Strickler.	T. S. Huffaker.
M. Conn.	G. M. Simcock.
R. B. Lockwood.	E. Goddard.
R. H. Abraham.	P. B. Maxson.
J. H. Watson.	G. R. Harper.
Peter Harvey.	M. M. Baker.
John T. Cox.	H. Kelley.
F. W. Potter.	S. S. Prouty.
A. V. Coffin.	J. B. Scott.
N. S. Goss.	Isaac W. Dow.

James Crane.

STATE OF KANSAS, } ss.
COFFEY COUNTY, }

Before me, a notary public in and for the county and State aforesaid, personally appeared A. V. Coffin, J. B. Scott and H. Kelly, three of the subscribers to the foregoing statement of association, to me personally known, who, being sworn in due form of law, on oath say, that the foregoing is a true statement of the association entered into by the parties whose names are thereto subscribed, and for the purposes therein set forth.

In testimony whereof, I have hereunto subscribed my name and official seal, this 20th day of September, A. D. 1865.

[SEAL.] JOHN F. COX,
Notary Public, Coffey County, Kansas.

STATE OF KANSAS, } ss.
OFFICE OF SECRETARY OF STATE, }

I, James Smith, Secretary of State of the State of Kansas, do hereby certify that the foregoing is a true and correct copy of the original instrument of writing, filed in my office September 25, 1865.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal. Done at Topeka, this 18th day of December, A. D. 1880.

[SEAL.] JAMES SMITH, *Secretary of State.*

ARTICLES OF INCORPORATION OF THE MISSOURI, KANSAS & TEXAS RAILROAD COMPANY.

STATE OF KANSAS, } ss.
COUNTY OF BOURBON, }

We, the undersigned, hereby certify that in accordance with the provisions of chapter 23, Laws of Kansas, A. D. 1868, page No. 190, we have associated ourselves together as a joint stock company, under the name and title of the Missouri, Kansas & Texas Railroad Company.

The purpose for which said company is formed, is the construction and operating of a railroad from a point on the State line of Kansas and Missouri, where the Fort Scott branch of the Tebo & Neosho Railroad of Missouri intersects the same, in a westerly or southwesterly direction, through the city of Fort Scott, to a point on the southern or western boundary of the State of Kansas, near the southwest corner thereof, through the counties of Bourbon, Allen, Neosho, Woodson, Wilson, Greenwood, Howard, Cowley, Sumner, Harper, Barbour, Comanche, and Clark—an estimated distance of three hundred and fifty (350) miles.

The principal office of said company shall be in the city of Fort Scott, State of Kansas, until otherwise ordered.

The term for which said company shall exist shall be ninety-nine (99) years.

The number of directors shall be five (5), and George A. Crawford, H. T. Wilson, and J. R. Morley, of Fort Scott, State of Kansas, and A. C. Marvin and Cyrus Newkirk, of Sedalia, State of Missouri, shall be the directors for the first year.

The amount of the capital stock of said company shall be five million ($5,000,000) dollars, divided into fifty thousand shares of one hundred dollars each.

Witness our hands, this twenty-third day of December, A. D. 1869.

GEORGE A. CRAWFORD.
HIERO T. WILSON.
J. R. MORLEY.
ASA C. MARVIN.
CYRUS NEWKIRK.

STATE OF KANSAS,
COUNTY OF BOURBON, } ss.

Personally, before the undersigned, a notary public, in and for the county of Bourbon, and State of Kansas, came George

A. Crawford, H. T. Wilson, and John R. Morley, to me personally known to be the identical persons whose names are affixed to the foregoing certificate, and who are citizens of the State of Kansas, and acknowledged the making and signing of the same to be their voluntary act and deed, for the purposes therein stated. In testimony whereof, I have hereunto subscribed my name, and affixed my official seal, this 23d day of December, A. D. 1869.

[SEAL.] P. H. TIERNAN, *Notary Public.*

STATE OF MISSOURI, }
COUNTY OF PETTIS, } ss.

Personally, before the undersigned, a notary public, in and for the county of Pettis, and State of Missouri, came A. C. Marvin and Cyrus Newkirk, to me personally known to be the identical persons whose names are affixed to the foregoing certificate, and acknowledged the making and signing of the same to be their voluntary act and deed, for the purposes therein stated.

In testimony whereof, I have hereunto subscribed my name, and affixed my official seal, this 24th day of December, A. D. 1869.

[SEAL.] J. F. TOBIAS, *Notary Public.*

I, James Smith, Secretary of State of the State of Kansas, do hereby certify that the foregoing is a true and correct copy of the original certificate of incorporation filed in my office, December 30, A. D. 1869.

In testimony whereof, I have hereunto subscribed my name, and affixed my official seal. Done at Topeka, this 17th day of December, A. D. 1880.

[SEAL.] JAMES SMITH,
Secretary of State.

OFFICE OF MISSOURI, KANSAS & TEXAS RAILWAY CO.,
19 BROAD STREET, ROOMS 47 AND 48.
NEW YORK, April 4, 1870.

This is to certify, that at a meeting of the stockholders of the Union Pacific Railway Company, Southern Branch, held (pursuant to request of stockholders) at the office of Messrs. Ruggles & Plumb, in Emporia, Kansas, on the third day of February, A. D. 1870, the following resolution was passed:

Resolved, That the name of the "Union Pacific Railway Company, Southern Branch," be, and the same is hereby, changed to, and made "Missouri, Kansas & Texas Railway Company," from and after this date, and shall by that name be hereafter known, and the officers of the company are directed to give the necessary legal notice of said change of name.

H. B. HENSON,
Assistant Secretary.

I, James Smith, Secretary of State of the State of Kansas, do hereby certify that the foregoing is a true and correct copy of the original instrument of writing filed in my office May 23, A. D. 1870.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal, this 18th day of December, A. D. 1880.

[SEAL.]

JAMES SMITH,
Secretary of State.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.

Levi Parsons, President of the Missouri, Kansas & Texas Railway Company (late Union Pacific Railway Company, Southern Branch), being duly sworn, deposes and says that at a meeting of the stockholders of the said Union Pacific Railway Company, Southern Branch, held at Emporia, Kansas, on the third day of February, 1870, at which meeting

a majority of the stock of said company was present, it was voted that the name of said Union Pacific Railway Company, Southern Branch, be changed to, and made "Missouri, Kansas & Texas Railway Company."

LEVI PARSONS, *President.*

Subscribed and sworn to before me, this 26th day of March, 1870.

[SEAL.] WM. H. RUSSELL,
Commissioner for Kansas, in the City, County and State of New York.

I, James Smith, Secretary of State of the State of Kansas, do hereby certify that the foregoing is a true and correct copy of the original instrument of writing filed in my office March 31, 1870.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal, at Topeka, Kansas, this 18th day of December, A. D. 1880.

[SEAL.] JAMES SMITH,
Secretary of State.

This indenture, made the eleventh day of October, in the year of our Lord one thousand eight hundred and seventy, between the Tebo & Neosho Railroad Company, a corporation organized under the laws of the State of Missouri, party of the first part, and the Missouri, Kansas & Texas Railway Company, a corporation organized under the laws of the State of Kansas, party of the second part: *Witnesseth*, That in consideration of the sum of one dollar paid to the said party of the first part, by the said party of the second part, the receipt of which is hereby acknowledged, and of the benefits and advantages them thereunto moving and in accordance with the resolution of the stockholders of the party of the first part, passed on the eleventh day of October, A. D.

1870, and the consent in writing of a majority in interest of the stockholders of the party of the first part, the said parties of the first and second parts have reciprocally covenanted and agreed to and with each other, as follows:

The party of the first part doth hereby sell and transfer to the said party of the second part all its privileges, rights, powers, franchises, real estate, and other property, the whole or a part of which is in this State, excepting such only as belong to the extension of the Tebo & Neosho line north from Sedalia, via Boonville, Fayette and Moberly, to the railroad bridge at West Quincy, declared July 2, 1869, certificate of which, dated July 3, was filed in the office of Secretary of State, and doth consent to a merger of the same, with the franchises, property, and rights of said party of the second part; and the said Missouri, Kansas & Texas Railway Company, party of the second part, shall have, exercise and enjoy all the rights, powers, privileges and immunities of the original charter of the Tebo & Neosho Railroad Company, and of the several amendments thereto, in the same manner and to the same extent as has been heretofore exercised and enjoyed by the said party of the first part, or by the several shareholders in the said company, whose stock shall be exchanged as herein provided, either or both.

And the said party of the second part does hereby accept the terms and conditions of the within instrument.

And the said party of the second part further agrees to increase its capital stock thirty-six thousand five hundred and seventy-five shares, being an amount equal to the capital stock of said party of the first part, which has been subscribed and paid for by parties, individuals, or the several towns, cities and counties situated along the portion of the road of said party of the first part so conveyed and merged, and to issue and deliver to the holder of every share of the

capital stock of the said party of the first part so subscribed and paid for in good faith, or contracted to be issued as aforesaid, in exchange therefor, in accordance with the terms of the resolution of the stockholders of said party of the first part, passed October 11, 1870, authorizing this conveyance, one share of the par value of one hundred dollars of the stock of said party of the second part, subject to all calls and liabilities, if any, attaching to the stock so exchanged.

In witness whereof, the said parties hereto have caused their respective seals to be hereto affixed, and these presents to be signed by their respective presidents, the 19th day of October, A. D. 1870.

THE TEBO & NEOSHO RAILROAD COMPANY,

[SEAL.] BY ASA C. MARVIN, *President.*

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,

[SEAL.] BY LEVI PARSONS, *President.*

STATE OF MISSOURI, }
COUNTY OF PETTIS, } ss.

Be it remembered that Asa C. Marvin, who is personally known to the undersigned, a notary public within and for said county and State, to be the person whose name is subscribed to the foregoing instrument of writing as a party thereto, as president, and to be the president of the Tebo & Neosho Railroad Company, a party thereto, this day appeared before me and acknowledged that he executed and delivered the same, as the voluntary act and deed of the said Tebo & Neosho Railroad Company, for the uses and purposes therein contained.

In witness whereof, I have hereunto set my name and affixed my official seal, at office in Sedalia, in said county and State, the 28th day of October, A. D. 1870.

[U. S. STAMP.] J. F. TOBIAS. [Notarial seal.]

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } ss.

Be it remembered, that on this 5th day of November, A. D. one thousand eight hundred and seventy, before me, the subscriber, Oliver P. C. Billings, a commissioner in and for the State of New York, appointed by the Governor of the State of Missouri to take proof and acknowledgment of deeds, mortgages, or any other instrument to be used or recorded in the said State of Missouri, personally appeared Levi Parsons, who is personally known to me to be the identical person whose name is affixed to the foregoing indenture, as president of the Missouri, Kansas & Texas Railway Company, a party thereto, and acknowledged that he executed and delivered the same, as the voluntary act and deed of the said Missouri, Kansas & Texas Railway Company, for the uses and purposes therein contained.

In testimony whereof, I have hereunto set my hand and affixed my official seal, in the city of New York, on the day and year above written.

[NOTARIAL SEAL.] OLIVER P. C. BILLINGS,
Commissioner for the State of Missouri,
15 Nassau St., N. Y.

OFFICE OF THE MISSOURI, KANSAS &
TEXAS RAILWAY COMPANY,
NEW YORK, December 5, 1870.

We, Levi Parsons, president, and Henry B. Henson, secretary of the Missouri, Kansas & Texas Railway Company, do hereby certify that the foregoing is a true and correct copy of an original indenture made the 11th day of October, A. D. 1870, between the Tebo & Neosho Railroad Company, of Missouri, and the said Missouri, Kansas & Texas Railway Company, for a sale and merger of all the corporate rights, privileges, franchises, and property of the said Tebo & Neosho Railroad Company, to and with the corporate fran-

chises, rights, and property of the said Missouri, Kansas & Texas Railway Company, which said indenture was duly ratified and approved by the parties holding and representing at least two-thirds of the capital stock of said Missouri, Kansas & Texas Railway Company at a special meeting of the stockholders of said company, duly called for that purpose, and held at the office of Ruggles & Plumb, in the city of Emporia, in the State of Kansas, on the 11th day of November, A. D. 1870.

Witness our hands and the seal of said Missouri, Kansas & Texas Railway Company, this day of December, A. D. 1870.

[SEAL.] LEVI PARSONS, *President.*
H. B. HENSON, *Secretary.*

STATE OF KANSAS, }
OFFICE OF SECRETARY OF STATE. }

I, James Smith, Secretary of State of the State of Kansas, do hereby certify that the foregoing is a true and correct copy of the original instrument of writing filed in my office on the 9th day of December, A. D. 1870.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal. Done at Topeka, Kansas, this 18th day of December, A. D. 1880.

JAMES SMITH,
Secretary of State of the State of Kansas.

UNITED STATES OF AMERICA, }
DISTRICT OF KANSAS, } ss.

I, A. S. Thomas, Clerk of the Circuit Court of the United States of America for the District of Kansas, do hereby certify the foregoing to be a true, full and perfect copy of the bill, and of the affidavit of L. C. Weir, thereto annexed, and a copy of the order for defendant to show cause thereon and thereto attached, in the suit of William B. Dinsmore, as President of the Adams Express Company, and a shareholder

therein, vs. The Missouri, Kansas & Texas Railway Company—No. 3307 in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said District of Kansas, this 28th day of December, A. D. 1880.

[SEAL.] A. S. THOMAS, *Clerk.*

TEMPORARY RESTRAINING ORDER.

And upon the 15th day of March, 1881, being the return day of the rule herein as entered and continued, parties appeared by their respective counsel, the complainant being represented by C. A. Seward and C. W. Blair, and the defendant being represented by T. J. Portis and A. L. Williams, and a motion for an injunction *pendente lite* was heard upon the bill and answer, with affidavits and additional affidavits, read both by complainant and defendant, and same was argued by counsel, which argument extended into the 16th day of March, 1881. The court having heard said affidavits, and argument of counsel, is of opinion that the motion for said injunction should be granted, and the court doth therefore order that the defendant herein, its officers, agents, servants and employés, and all persons acting under or by virtue of its authority, be and the same are hereby enjoined and restrained until the final hearing of this cause from interfering with, or disturbing in any manner, the enjoyment by the Adams Express Company of the facilities now accorded to it by the defendant herein, upon its lines of railway and the extensions thereof, for the transaction of the business of the said Adams Express Company, and of the express business of the public confided to its care, and from excluding or ejecting any of its express matter or messengers from the depots, cars, or lines of the said defendant, as the same have been heretofore and are now enjoyed

and occupied by the said Adams Express Company, and from refusing to receive and transport in like manner as the said defendant is now doing, and has heretofore done over its lines of railway, the express matter and messengers of the said Adams Express Company, and from interfering with or disturbing the business of the said Adams Express Company, or its present relations in reference thereto with the said defendant, in any way or manner whatsoever, so long as said Adams Express Company shall be willing and ready, or shall offer to pay according to its present rates with the defendant.

It is further ordered, that the plaintiff pay to the defendant for its services the same compensation as is now paid until the next term of this court, subject to a reconsideration or readjustment of such compensation at said term, to relate back to the date of the original restraining order herein, or the date of this order, as the court may then direct. It is further ordered, that the complainant is not to carry express freight at rates less than fifty per cent. above the rates of the regular freight traffic of the defendant, provided that the complainant shall not be required to charge higher rates than any other express company doing business on defendant's road. And it is further ordered, that a writ of injunction issue herein to the defendant to carry the foregoing order into execution.

ANSWER.

IN THE

CIRCUIT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF KANSAS.

IN EQUITY.

The Answer of the Missouri, Kansas & Texas Railway Company to the Bill of Complaint of Wm. B. Dinsmore, as President of the Adams Express Company, and a shareholder therein:

This defendant, saving to itself now and at all times hereafter all and all manner of benefit and advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is necessary or material for it to make answer to, answering, saith:

That it has no knowledge or information respecting the averment of said bill, that heretofore, and in the year 1839, one Alvin Adams, then of Boston, Mass., originated, and subsequently, with the plaintiff as his partner, under the firm-name of Adams & Co., perfected the means not theretofore adopted by any existing common carrier, for collecting, transporting and delivering, over public routes and highways, and by means of railways and steamboats, moneys, bank bills, coin, bullion, bonds, and securities of every kind and nature, packages containing articles of greater or less value, as contradistinguished from ordinary freight, and the collection and remission of proceeds of unpaid bills and

accounts, and devised and constituted the means, checks and safeguards necessary for the safe transportation and transmission thereof; and in so doing, built up for the said Adams & Co. a large and valuable business and property therein; and which said business was transacted between the cities of Boston and New York, over the line of the Boston & Worcester Railroad Company, and the steamboats running between Norwich and New York, aforesaid; and that the said Adams & Co. thereafter extended their said business over the line of the Camden & Amboy Railroad Company, from the city of New York aforesaid to the city of Philadelphia. And because this defendant has no knowledge or information respecting the said averment, it neither admits nor denies the same, but calls for strict proof thereof.

And this defendant has no knowledge or information respecting the averment of said bill, that subsequently thereto Edwards S. Sanford, now a citizen of the State of New York, and then a citizen of the city of Philadelphia, and Samuel M. Shoemaker, now a resident of the State of Maryland, then of the city of Baltimore, organized and perfected the means for conducting a similar business between the cities of Philadelphia and Baltimore, and which said business was subsequently extended from Baltimore to Washington, over the Washington branch of the Baltimore & Ohio Railroad; and that, by an arrangement between the said parties, the business of the said Sanford & Shoemaker was united with that of the said Adams & Co., and thereafter was by them extended from Philadelphia to Pittsburg, by the railways and canals then operated between said cities. And because this defendant has no knowledge or information respecting the said averment, it neither admits nor denies the same, but calls for strict proof thereof.

This defendant has no knowledge or information respecting

the averment of said bill, that at or about the same time Johnston Livingston, now a citizen of the State of New York, was engaged in conducting a similar business, also between the cities of New York and Philadelphia. And because this defendant has no knowledge or information respecting the said averment, it neither admits nor denies the same, but calls for strict proof thereof.

This defendant has no knowledge or information respecting the averment of said bill, that the firm of Harnden & Co. were also then engaged in conducting a similar business between Boston and New York, by the way of Providence, and from New York to Albany, and from Boston to Albany, by means of the railways and steamboats then in use between said cities; and that the said firm of Adams & Co. purchased the business of the said Harnden & Co. And because this defendant has no knowledge or information respecting the said averment, it neither admits nor denies the same, but calls for strict proof thereof.

This defendant has no knowledge or information respecting the averment of said bill, that at or about the same time Daniel Phillips and Clapp Spooner, both now citizens of the State of Connecticut, were engaged in the conduct of a similar business between the cities of New York and Hartford, over the line of the New York & New Haven Railroad Company; and James M. Thompson, now a citizen of the State of Massachusetts, was likewise so engaged over the line of the Hartford & Springfield Railroad Company, between the cities of Hartford and Springfield; and Robert F. Weaver and Stephen O. Potts, both now citizens of the State of Pennsylvania, were also engaged in the conduct of a similar business between the cities of Philadelphia and Reading, over the railroad then existing between the same. And because this defendant has no knowledge or information respect-

ing the said averment, it neither admits nor denies the same, but calls for strict proof thereof.

This defendant, further answering, denies that neither the railway nor the steamboat companies then or now existing had ever undertaken, or held themselves out to the public as ready to undertake the conduct of the business aforesaid; but on the contrary thereof, this defendant alleges the fact to be that many railway and steamboat companies do transact and conduct such business, and have in the past transacted and conducted the same, and have the right and it is their duty so to do under their charters; and defendant admits that the conduct of such business involves the collection from the consignors and delivery to the consignees of the property transported, its protection while in transit, and a pecuniary responsibility to the owner in case of a loss, but avers that it is within the usage and ability of railway and steamboat companies to collect from consignors and deliver to consignees the property transported, protect the same while in transit, and to make good to the owner any loss which may occur, for which said companies are liable to respond in damages.

This defendant, further answering, admits that the business aforesaid is known as the *express business*, but denies that the persons, firms and corporations engaged therein have always been known and now are known exclusively as *express* companies; but asserts that said business may be transacted by any person, firm or corporation authorized to transact the business of a common carrier, under whatever name, and that said business often is done by railway companies, under their name and designation as railway companies.

This defendant, further answering, on information and belief, denies that from the commencement of the transaction of the express business, and until the present time, all the principal

railway, steamboat and steamship companies of the United States have recognized the identity of the express business—the distinction which existed between the same and the common carriage of goods, wares and merchandise; have always extended to the express companies all needful facilities for the transportation of the property committed to their care; have always afforded transportation for the representatives of the express companies having charge of the property in transit so committed to their custody; and have always exacted and received from the express companies an indemnity against damage by reason of the loss of or injury to such property while in transit. But, on the contrary thereof, defendant alleges the fact to be, that certain firms, companies and corporations known as express companies have, from time to time, by mutual and satisfactory agreements between themselves and railway companies, conducted business as common carriers over lines of railway; but defendant avers that there is no distinction, in fact or in law, in the business of a common carrier as transacted by express companies and as transacted by railway companies; and defendant denies that the privilege which has from time to time been given to express companies to transact business upon lines of railway has ripened into absolute right on the part of such express companies to transact such business on a line of railway, without the consent of the owner thereof; but avers that the privilege so extended to express companies has been extended for the mutual advantage and convenience of the express companies and the railway companies.

Defendant, further answering, says that it has no knowledge or information respecting the averment of said bill, that on the first day of July, 1854, the said Adams & Company, composed as aforesaid of the said Alvin Adams, and said plaintiff, the said Edwards S. Sanford, and the said Sam-

uel M. Shoemaker, the said Johnston Livingston, the said Daniel Phillips and Clapp Spooner, the said James M. Thompson, and the said Robert F. Weaver and Stephen O. Potts, with the other parties interested with them, united in a joint and common undertaking and concern, all their various several express lines and the business appertaining thereto, and by so doing then and there formed a new organization, or company, called from that date, and now, "The Adams Express Company;" that the interest of all the parties so contributing to the formation of said new organization in the property so by them contributed, was thereafter held by them jointly and in common, and was divided into 12,000 shares, to which no pecuniary value was assigned, and which said shares were apportioned among the parties aforesaid, and have usually had and now have a market value of not less than $100 a share; and that the said Alvin Adams subsequently died. And because this defendant has no knowledge or information respecting the said averment, it neither admits nor denies the same, but calls for strict proof thereof.

And said defendant, further answering said bill, admits that all of the nine persons named in said bill, including the said plaintiff, as holding shares in the said Adams Express Company, have been since the first day of July, 1854, and now are, holders of shares in said Adams Express Company; and defendant admits that the number of shares in said company has been from time to time increased, and is now 120,000; and defendant admits that the holders of said shares now exceed 2,500 in number, but has no knowledge or information as to whether they are all citizens and residents of the United States, or as to whether any of them are citizens or residents of the State of Kansas, and therefore neither admits nor denies the same, but calls for strict proof; and defendant alleges that the said holders of shares in said Adams Express

Company are mere partners, and that the said Adams Express Company is a mere partnership, transacting business under said name of the Adams Express Company, and that the status of said Adams Express Company, and its rights in respect to bringing and defending suits, is the same, and not different from that of any other partnership. And defendant hereby calls upon said plaintiff to disclose the names and residences of said partners.

The said defendant admits that the said Adams Express Company, since the date of its association, has always had its principal office and place of business in the city of New York, and that its books and assets are there kept, and that the meetings of its managers are there held, and that it never has had, nor does it now have, a principal office or place of business in any other city.

The defendant, further answering, says that it has no knowledge or information respecting the act of the Legislature of the State of New York, set up in said plaintiff's bill, or whether the same was ever passed or not, or whether it contained the provisions mentioned in said bill; but this defendant alleges that said act can have no force or effect beyond the limits of the said State of New York, and is not a proper subject for the consideration of this court, and confers no rights whatever upon the plaintiff herein, or upon the Adams Express Company, which can or will be recognized in this court; and defendant here suggests that plaintiff's bill herein is defective for want of parties, and that the same ought to have been brought in the name of the persons composing the partnership known as the Adams Express Company, and not in the name of the said William B. Dinsmore.

Said defendant has no knowledge or information respecting the averment of said bill, that in the year 1856 the plaintiff was chosen and selected as the president of the Adams

Express Company, and from that time until the present has been and is now such president; that all suits which, since such election, brought in the State of New York by the said company, have been brought by it in the name of said plaintiff, as such president, and that, with but few exceptions, all suits against such company so there brought, have been brought against said plaintiff as such president; that in some few excepted cases, suits have been there brought against the then treasurer of said company. And because this defendant has no knowledge or information respecting the said averment, it neither admits nor denies the same, but calls for strict proof thereof. But defendant avers that the form and manner in which suits have been brought by and against said Adams Express Company in the State of New York, by no means determines the form and manner in which suits should be brought in this court; and defendant further avers, that the objection hereinbefore taken to the defect of parties in this suit, is not a matter which can be obviated by an appeal to principles of comity, and that the principles of comity, as allowed and acted upon in courts of justice, have no application whatever to a defect of parties.

And defendant, further answering, objects to the said plaintiff suing in this case in his name and in his own behalf, and also as a representative of and in behalf of all the other partners in said Adams Express Company, and here demands that said plaintiff elect whether he will sue in such last-mentioned capacity, or will rely upon the principles of comity suggested in said bill.

Said defendant, further answering, admits that the Adams Express Company, having so as aforesaid assumed that name as the name of its organization, has by such name thencehitherto been known, and is now known, and in accordance with the usage obtaining in its business and with the public,

has been known and contracted with; but whether it has been sued in that name in many of the States of the Union, or in any of said States, this defendant has no knowledge or information, and, therefore, neither admits nor denies the averment that it has been so sued in many of the States of the Union.

This defendant, further answering, admits that, after the formation of the Adams Express Company, various other express companies were formed for the conduct of the same general business over the thoroughfares of the country.

Defendant has no knowledge or information as to the reasons which induced the Adams, the American and the United States Express Companies to agree among themselves that they would reach the commercial centers of the country by different railway and steamboat routes, and that they would divide the North and South express business in a manner best calculated to the welfare thereof; but defendant avers, upon information and belief, that said express companies did so agree among themselves, and that they did thereupon divide the North and South express business among themselves; but defendant denies that such division was made in a manner best calculated for the welfare thereof. Defendant has no knowledge or information as to how this understanding relative to the division of the business among the different express companies was effectuated, but defendant admits that it was effectuated; and defendant avers that all such agreements and understandings for a division of territory are contrary to public policy and are unlawful and immoral, and result and are intended to result in the creation of monopolies, in violation of the rights of the public and to the great injury and detriment of the public welfare. And defendant avers that the said Adams Express Company has for many years been in the habit and practice of entering into so-called divisions

of territory with other express companies, and that, among other territory so divided up and parceled out, was the territory through which the line of defendant's road is operated, and that such division and apportionment of territory as aforesaid has resulted in a great and serious loss to this defendant and to the public, as will more fully appear by the subsequent averments of this answer.

This defendant, further answering, says that it has no knowledge or information as to the averment of said bill, that in various instances two express companies have, at the same time, and with permission of the railroad company, occupied, for a greater or less distance, the same line of railroad; and whether said occupation has not been incompatible with the harmonious workings of said express companies; and whether it has resulted in a larger income to said railroad company than it would have received had its line been occupied by one express company only; and as to whether it has also afforded the public the opportunity, both upon short and long routes, for the most efficient service and for the competition to which it is lawfully entitled. And defendant suggests and avers that all such allegations, in which said bill so largely abounds, are inserted for reasons not pertinent to the subject-matter of this suit, and are mere matters of argument by no means applicable to this controversy.

And defendant, further answering said bill, avers that it has no knowledge or information respecting the averment of said bill that under the mutual understanding aforesaid, the Adams Express Company, as soon as the demands of the public warranted the expenditure, extended its business westward to the cities of Wheeling, Columbus, Cincinnati, Indianapolis, Louisville and St. Louis, by means of the facilities afforded by the Pittsburg, Cincinnati & St. Louis Railroad and other companies, and thereby made the route of the

said Adams Express Company continuous from Boston, New York, Philadelphia and Pittsburg to the cities last aforesaid, and such continuous routes are now operated by it. And because this defendant has no knowledge or information respecting the said averment, it neither admits nor denies the same, but calls for strict proof thereof.

This defendant, further answering said bill, avers that it has no knowledge or information as to whether, under the arrangements or understandings mentioned in said bill, said Adams Express Company extended its business in a southerly direction, nor whether the word "express" imports that it always extended its business by the shortest line of communication. And defendant has no knowledge as to whether the said Adams Express Company extended its line to Richmond, Charleston, Savannah, Mobile, Montgomery, New Orleans, Memphis, and other places, and in so doing was always afforded by those occupying the public office of the common carrier all necessary facilities therefor, and which facilities were by said carrier increased to the said Adams Express Company in proportion with the increase of the demands of the public therefor; but defendant says that the treatment which the said Adams Express Company received from common carriers with whom it had business relations in the South, is quite immaterial in determining its rights in this suit.

This defendant, further answering said bill of complaint, upon information and belief, denies that the said Adams Express Company has always in the conduct of its business paid, and now pays, to the common carriers whom it employs a just and reasonable compensation, satisfactory to them for the facilities afforded, and that it has itself only charged a just and reasonable compensation for the express service performed by it for the public; but, on the contrary thereof, this

defendant alleges the fact to be that the said Adams Express Company has not always paid, and does not now pay, to the common carriers whom it employs a just and reasonable compensation, satisfactory to them for the facilities afforded, and especially it has not paid, and does not now pay, this defendant a reasonable compensation for the facilities afforded by it to said Adams Express Company. But this defendant avers on information and belief that the said Adams Express Company has charged the public large, and in some cases unreasonable, compensation for the service performed by it, whereby it has been enabled to grow in strength, power, and wealth, as recited by it in its bill of complaint.

Defendant, further answering, says, that it does not know what the plaintiff means by the averment in his bill that in the conduct of its business, as aforesaid, the Adams Express Company has always represented, and now represents, that portion of the public which desires to avail itself in the transmission of its property and values of the pecuniary responsibility of the Express Company, and of the safeguards and checks which it has originated, provided and enforced for the safe custody of the property committed to its care. But defendant, answering said averment according to the best lights it has, avers that said Adams Express Company has not always represented, and does not now represent, any portion of the public, and especially does not represent the public in larger or greater degree than this defendant does, or than other express companies of equal responsibility do; and this defendant denies that the safeguards and checks, which the Adams Express Company have originated, provided and enforced for the safe custody of the property committed to its care, are superior to those used and provided by other common carriers for the benefit of their patrons.

This defendant, further answering said plaintiff's bill,

states that it has no knowledge in respect to the averment of said bill, that the Adams Express Company conducted its business as aforesaid until the commencement of hostilities in 1861, when by reason of the derangements of commercial intercourse then ensuing, and for other controlling reasons of a public character then generally known, it was obliged to discontinue its organization and business in the Southern States, and it thereupon withdrew from the same, and sold so much of its good-will and its equipment as then there existed to the Southern Express Company, a corporation created, as said plaintiff is informed and believes, under and pursuant to the laws of the State of Georgia, and that since then the express business in the principal Southern States has been, and is now, conducted by the said Southern Express Company under said charter, by which it is expressly authorized to conduct the same, and which said charter gives a legislative description of the kind and character of business to be done by said company as an express company, and to a copy of which the plaintiff craves leave to refer. And because this defendant has no knowledge or information respecting the said averment, it neither admits nor denies the same, but suggests that the same contains no matter pertinent to the subject-matter of this case.

This defendant, further answering said plaintiff's bill, says that it has no knowledge or information respecting the averment of said bill that after the cessation of hostilities aforesaid, an arrangement was made, and which is now in force, between the said Adams Express Company and the said Southern Express Company, for the general regulation of the transportation of property coming from the territory of the one into the territory of the other, and by which, property received by the Adams Express Company, destined for points within the territory of the Southern, and property received

within the territory of the Southern destined to points within the territory of the Adams Express Company, or reached by its connections, is interchanged at certain specified points, and upon a basis of charge proportioned to the distance traversed in the territory of either; and that in case of such interchange of express matter within such territory, the express company originally receiving the same remains liable to the public for the value thereof until delivered to the consignee. And because this defendant has no knowledge or information respecting the said averment, it neither admits nor denies the same, but calls for strict proof thereof. And defendant avers that neither the Southern Express Company nor said Adams Express Company has any territory which rightfully belongs to it, and that said express companies have no sovereign rights and powers which can be made the subject of treaties and protocols for the division of territory; and as all such arrangements are illegal, oppressive and highly inequitable, this defendant insists that said plaintiff has no right to the assistance of a court of equity.

This defendant, further answering said bill, avers that it has no knowledge or information respecting the averment of said bill, that since the said understanding and arrangement the Adams Express Company has made such interchanges with the said Southern Express Company, and now makes the same at Richmond, Lynchburgh and Danville, Virginia; Chattanooga, Tennessee; Cairo, Illinois, and Paducah, Kentucky, and has not itself since then either delivered or received express matter directly south of said points; but the territory so directly south thereof has been operated by the said Southern Express Company alone. And defendant considers it quite immaterial in this case whether said Adams Express Company has made interchanges with the said Southern Express Company at the points named in said bill, or

whether it has not since either delivered or received express matter directly south of said points, and whether the territory directly south thereof has been operated by said Southern Express Company, or not.

And this defendant, further answering said plaintiff's bill, says, that it admits that the said Adams Express Company, since the sale mentioned in said bill to the Southern Express Company, has been engaged, and is now daily engaged, in the conduct of its express business over continuous routes, but this defendant does not know between what cities and other places said business has been or is now conducted, nor does this defendant have any knowledge or information as to the number of express organizations now transacting the express business of the country, nor whether such organizations meet the requirements of the public in the localities in which said business is transacted, and this defendant admits that different express companies throughout the country occupy, with the consent of the railway companies, and transact business over nearly every prominent railway in the United States. But this defendant has no knowledge of the amount of capital invested in said express companies, or whether it exceeds $40,000,000 or not, and this defendant is not informed and has no knowledge as to whether the property of said express companies is unincumbered by mortgages or not, and this defendant is not informed and does not know whether the capital of such said express companies constitutes at all times a fund ample to secure the public against any probable loss of its property while in the custody of the said express companies. And this defendant denies that security is not afforded by the different railways of the country for those who transact business with them, and this defendant especially avers that it is abundantly able at all times to satisfy claims

of all its customers and patrons for any loss which they may sustain by its negligence or from other legal cause.

This defendant, further answering the averment of said bill, that in addition to such aggregated capital thus furnished as security to the public, the public is also furnished with the further security of the individual liability of all the copartners in the copartnership engaged in the transaction of the express business, says that the capital invested by other express companies affords no security to persons dealing with the said Adams Express Company, and, therefore, this defendant does not perceive the force of the averment that there is an *additional* security in the individual liability of copartners; and as the names of said copartners are not given in said bill, nor elsewhere to the knowledge of this defendant, this defendant is unable to see the relevancy of said averment.

This defendant, further answering, admits that the State of New York has repeatedly refused to incorporate said copartners constituting the Adams Express Company, but has no knowledge as to the reasons which induced the State of New York to so refuse, and, therefore, calls for strict proof thereof.

This defendant, further answering on information and belief, denies that the said express companies have invested their capital and built up their business upon the express understanding with the railway companies that they would voluntarily afford all the facilities needed by the express companies as the representatives of the public for the transaction of its business; and denies that the said express companies are the representatives of the public for the transaction of its business; and denies that said express companies have invested their capital and built up their business upon the knowledge and belief that the public, whether demanding such facilities

in its individual capacity, or through the express companies as its representatives, had the legal right to compel the granting thereof by those who had been created by the public and for the public. This defendant admits that railway corporations have been created by the public and for the public, but alleges that certain rights have been given to them by the public and for the public in respect to their own property; and this defendant has been, and is, especially solicitous to exercise all those rights for the best interest of the public, and has, therefore, as in duty bound, sought to protect the public from the grasping and avaricious demands of the said plaintiff, as will more fully appear by the subsequent averments of this answer. This defendant admits that no railway company in the United States has ever refused to transport express matter for the public upon the application of some express company, of some form of legal constitution. This defendant admits that every railway company has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created of that class of matter which is known as "express matter," and avers that every railway company, so far as this defendant is advised, has always recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created, of every class of matter which is proper to be transported at all, and in this respect there has been no difference in the recognition by the railway companies of the rights of the public in relation to express matter and other matter to be transported over said railways. And this defendant denies that no railway company has ever had the legal ability to assume as between itself and the public such obligations for the transportation of such matter as are universally assumed by the express companies toward all who treat them with frankness; and this defendant avers that

railway companies in general, and this defendant in particular, have the clear and unquestionable right to transport over their railways every class of material which is fit and proper to be transported at all, and take upon themselves such obligations respecting the same as are taken by express companies, and such obligations as the law imposes on common carriers. And this defendant is not advised and has no knowledge or information as to what distinction is made by express companies between those who treat them with frankness and those who do not; but avers that it is the practice of this defendant to treat all persons with equal and exact justice, whether such persons treat this defendant with frankness or otherwise.

This defendant, further answering said bill, admits that since the so-called division of territory mentioned in said bill between the Adams Express Company and the Southern Express Company, the shares of the former have been increased to 120,000; and admits that it has from time to time extended its lines, and has now in daily use and occupation 21,216 miles of railway, operated by 4,297 employés, who make 911 daily trips, amounting to 64,560 miles daily, or 19,884,420 annually, for a compensation amounting to $1,568,730 annually, and at an expense to the said Adams Express Company for amounts paid for transportation to railway companies of $2,093,412 annually; and defendant admits that the number of miles thus operated are divided between 155 different railway companies, 11 steamboat and 9 stage companies, and that each of the same is now used by the said Adams Express Company as a vehicle of the interstate commerce committed to its care and custody. And defendant avers that said large amount of business transacted by said Adams Express Company has resulted in large gains and profits to said company, and has by no means been per-

formed by said company as a mere matter of generosity toward the public, as said plaintiff in its said bill pretends; and defendant avers that said business has been largely built up by divisions of territory, as averred in the bill, and other arrangements, by which the said Adams Express Company has secured a monopoly of the express business on many lines of railway. Defendant admits that the principal public demand for the existence and use of an express company has been as a medium of exchange of money and the collection of negotiable securities, and the transportation of express packages of greater or less value, or of packages the price or value of which is to be collected from the consignee at the time of delivery and remitted to the consignor; but defendant denies that it has in any manner interfered with or obstructed any demand of the public for the existence of an express company, and denies that there has been any demand along the line of its railway for the Adams Express Company in particular.

This defendant, further answering, admits that the public has always demanded in the transaction of its business an undoubted financial responsibility on the part of the carrier, known integrity on the part of the employés, and the invention and application of all moral and mechanical safeguards which ingenuity and experience could devise or suggest; and that it has required instrumentalities for the primary collection and subsequent delivery of express matter for the relief of the public generally in that regard. But this defendant avers that the financial responsibility of the said Adams Express Company is not greater than that of many other express companies and railway companies in the country; and avers that the employés of the said Adams Express Company have no special or particular qualification in the matter of integrity and honesty above that of the employés of other express

companies, and of this defendant; and that moral and mechanical safeguards have been and are afforded by other express and railway companies to an equal extent with those afforded by the said plaintiff; and defendant denies that the demand of the public in this respect has been made upon the theory or with the understanding that it was receiving greater security for the faithful transaction of its business by said express companies than could be afforded by the railway companies; and defendant says that for many years the said Adams Express Company has been the only company transacting business over many of the lines of railroad of the country, and has been the only express company transacting business over the line of this defendant's railway; and that the public had no opportunity to choose between the said Adams Express Company and other companies, or to make any special demand upon it for moral and mechanical safeguards; and the special solicitude of the said plaintiff for the welfare of the public, this defendant is informed and believes, is of very recent origin.

This defendant, further answering said bill, having hereinbefore denied the averment thereof that the express company is the representative of the public, now admits the averment thereof that the Government of the United States is the representative of the public, and admits that the Government of the United States has availed itself of the facilities and security afforded by the express companies to a very large extent, but to what extent this defendant has no knowledge. This defendant has no knowledge or information as to whether the said Adams Express Company safely carried and delivered for the Government, in the year 1878, $1,200,000,000, and in the year 1879, $661,000,000. And this defendant does not perceive in what respect the performance of such service for the Government in the years 1878

and 1879 entitles said plaintiff to the relief prayed for in this suit. This defendant has no knowledge or information as to whether during the year 1879 the said Adams Express Company carried for the general public the sum of $1,050,000,000, or whether it received it and disbursed it at 3,000 different offices. This defendant admits that the laws of the United States now in force permit the use of the mails for the transportation of moneys and of many other articles at what are called "third-class rates," and defendant admits that the railway companies of the country, unless forbidden by their charters, have instrumentalities for the transportation of moneys and securities from point to point, but defendant denies that neither the Government of the United States nor the public generally have ever used, to any appreciable extent, either the mails or railways for the transmission of moneys or other securities.

This defendant, further answering said bill, denies that the express companies have been created by the public as their instrumentalities for the transmission as well of public as of private moneys, and avers that the said plaintiff, one of the principal express companies of the country, and whose annual business, as appears by the schedule and inventory thereof in said bill, is enormous in extent, is a mere private partnership, not created by the public, nor invited by the public to exist, but formed by the mutual consent and agreement of the persons constituting said partnership, for their private gain and profit. And defendant further denies that the necessity for the existence of express companies is as great as the necessity for the ordinary vehicles of commercial intercourse, although this defendant admits that it is not able accurately to state the comparative necessity of express companies and of the other ordinary vehicles of commercial intercourse; and the said averment in said bill is a mere

matter of speculation, upon which well-informed persons may reasonably differ; and this defendant, therefore, neither admits nor denies the same, but calls for strict proof thereof.

This defendant, further answering, says, that it has no knowledge or information as to whether, in addition to the amounts of money stated in said bill, the said Adams Express Company has daily received and transmitted from its New York office over 14,000 packages of express matter, or whether it daily employs in making its primary collections and subsequent deliveries over 918 horses, with the necessary wagons therefor, and therefore calls for strict proof.

This defendant, further answering said bill, admits that the Missouri, Kansas & Texas Railway Company is a corporation, and admits that it was incorporated by the Legislature of the Territory of Kansas, and that it received material aid from the State of Kansas, and admits that it has been and now is engaged in operating a line of railway for the conveyance of passengers, goods, wares and merchandise, and express matter, between Fort Scott, Parsons and Junction City, in the State of Kansas, and between the same and other places in the States of Missouri and Texas and in the Indian Territory south of the State of Kansas.

This defendant, further answering, admits that on the 23d day of November, 1871, this defendant and the said Adams Express Company entered into the agreement mentioned and set forth in said bill. And this defendant, further answering, admits that since the execution of said contract the said Adams Express Company has been in the enjoyment of the facilities described therein, and has been daily in the use thereof, over the line of the defendant's railway between the points in said contract mentioned, and with the permission of this defendant has extended the same southward to Denison, Texas; but denies that the said contract is still

and now in force. This defendant admits that said express company has interchanged express matter in the State of Kansas, at various points on the line of defendant's railway, with various express companies; but this defendant has no knowledge or information as to whether the said defendant's line of railway constitutes the only link of inter-state communication occupied by the Adams Express Company for its eastern and western through business. And this defendant avers that it is under no legal or moral obligation to furnish a link of inter-state express communication for the said Adams Express Company; and defendant admits that the said railway constitutes a link of express communication now had by the Adams Express Company between the points on the line of the said defendant's railway and the points west thereof, in the State of Colorado.

And defendant, further answering, avers and says, that it denies that the compensation paid by the said Adams Express Company, in said contract specified, was nominated and prescribed by this defendant as a just and reasonable compensation to be demanded and received by it, and avers the truth to be that such compensation was nominated by both parties hereto, as set forth in said contract, and that this defendant was compelled to accept the terms of said contract, whether reasonable or not, because of the monopoly of the express business by said complainant in the territory reached by this defendant, whereby it was enabled to dictate its own terms.

This defendant, further answering, says, that it admits the truths of the allegations contained in the twenty-sixth and twenty-seventh paragraphs of complainant's said bill of complaint.

And, for further answer, defendant avers and says, that as to the matters contained in the twenty-eighth paragraph of complainant's bill it does not know, and cannot therefore

say, whether Jay Gould is largely interested in the ownership and management of a number of railroads known as the Wabash system, nor whether the railways comprised in said system have granted to the Pacific Express Company all needful railway facilities for the conduct of the express business over the lines of railway embraced in said system, nor does it know that the said Pacific Express Company is now daily engaged in the conduct of the express business of such lines, and therefore demands strict proof thereof. But the defendant admits that the Pacific Express Company is a corporation duly created according to the laws of the State of Nebraska, and is now daily engaged in the conduct of the express business on the line of this defendant, by virtue of certain contracts hereinafter set forth.

Defendant, further answering, says that it denies that it intends, on the first of January, 1881, or at any time thereafter, to exclude and eject the Adams Express Company, its messengers and business, from its line of railway and from its cars, depots and stations; and that, unless restrained by order of this court, it will carry such intention, on said date, into practical effect, and will thereafter refuse to the Adams Express Company, and to the public employing it, the facilities heretofore granted for the transaction of express business; and if such intention is carried into effect, so much of the public as has heretofore employed and is now employing the Adams Express Company will be deprived of the right to have its express matter exported over the railway lines of the defendant, and as the shortest through line between New York and Denison, Texas, except as hereinafter fully stated.

The defendant, further answering, says, that it has no knowledge or information respecting the averment in plaintiff's bill that the Adams Express Company in the conduct of its business generally, and over the defendant's line, is

acting solely as the agent and representative of the public; that the said company does not own the property committed to its charge; that the title thereto is in the shippers or consignees thereof; that the said consignees and shippers reside in almost every State of the Union, and that they employ the Adams Express Company to perform and demand such services in respect to the express matter committed to the charge of said company as such owners or shippers may desire; and for the reason that it has no knowledge or information respecting the said averment, it neither admits nor denies the same, but calls for strict proof thereof.

The defendant, further answering, says, that it has no knowledge or information respecting the averment in plaintiff's bill, that successive actions at law, to be brought upon daily tenders of express matter to the said defendant, and its daily refusals to transport the same, would involve the Adams Express Company in a multiplicity of litigations, which it has not the ability to institute or to prosecute on every occasion and in every county when and where such tenders and refusals should take place, and that such litigations would be valueless in point of recovery to the said Adams Express Company, and would not protect its right on behalf of the public to have its express matter continuously carried for a just and reasonable compensation; and for the reason that it has no knowledge or information respecting said averment, it neither admits nor denies the same, but calls for strict proof thereof. And the defendant denies that it intends to exclude or prevent the said Adams Express Company, for its own benefit, or as the agent of any other person, persons, or corporation, to forward express matter over its lines of railroads upon reasonable terms; and defendant denies that such action will not present the case of a single and temporary disturbance of the business of the Adams Express

Company, or that from its very nature it will constitute a permanent, perpetual and irreparable injury thereto, or the entire loss, within the localities designated, of its good-will, business, reputation and property therein, or would, within the same localities, permanently prevent it from accomplishing for the public the specific objects for which the said Adams Express Company was organized and perfected; or that the said Adams Express Company is remediless in the premises at and by the course of the common law, or that the common law does not and cannot afford so adequate and perfect a remedy herein as it is within the jurisdiction and province of a court of equity to afford.

The defendant, further answering, denies that it is the intention of the said defendant to accord to the said Pacific Express Company, on the 1st day of January, 1881, the sole and exclusive enjoyment of the facilities on its line, and needed for the conduct of the express business thereon, and such as have heretofore been accorded under the said contract, and by the usage and custom of the defendant thereunder, to the said Adams Express Company, or to eject the said Adams Express Company therefrom.

The defendant, further answering, denies that it is the intention and purpose of the said defendant to exclude and eject the said Adams Express Company from the cars, lines, depots and stations of the said defendant on and after the 1st day of January, 1881, and thereafter to undertake the exclusive conduct of the express business on its own behalf and in its own name, and to refuse to recognize any right of the Adams Express Company. But the defendant avers that on the day of , 1880, it leased its entire road in Missouri, Kansas, the Indian Territory and Texas to the Missouri Pacific Railway, a corporation duly organized and doing business under the laws of the State of Missouri; and

that said Missouri Pacific Railway thereupon then and there entered upon, took possession of said road, and has ever since continually occupied, managed, operated and controlled the same as fully as if it were its own property; and thereupon, by reason of said lease, this defendant ceased to have or exercise any control over the management or operation of said property. And defendant says that, after the said lease was made, to wit, on the 31st day of January, A. D. 1881, A. A. Talmage, General Manager of the Missouri Pacific, and as such General Manager of the road of this defendant, in the name of this defendant, made and executed to and with the said Pacific Express Company the following contracts:

Memorandum of an agreement made this 31st day of January, A. D. 1881, by and between the Missouri, Kansas & Texas Railway Company, by A. A. Talmage, its General Manager, party of the first part, and the Pacific Express Company, by E. M. Morsman, its General Manager, party of the second part, witnesseth:

The Missouri, Kansas & Texas Railway Company will permit the Pacific Express Company to do an express business over the following lines of railroad, to wit: That part of the railroad running from Sedalia, Missouri, on the north, to Denison, Texas, on the south, and from Parsons, Kansas, to Junction City, Kansas, on the following terms and conditions:

The Missouri, Kansas & Texas Railway will furnish for the Pacific Express Company sufficient space in its baggage cars, to be hauled on passenger trains between Sedalia, Missouri, and Denison, Texas, for five thousand pounds of through freight each way, each day that a train is run, and between Parsons, Kansas, and Junction City, Kansas, for two thousand pounds of through freight each way, each day a train is run, and for one agent or messenger, who shall have charge of the express, and a safe for money and valuable packages.

As compensation to the railway company for the privileges furnished as herein provided, the said Pacific Express Company agrees to pay to the said railway company the sum of two hundred and twenty-five dollars per day for each and every day that a passenger train is run, and one-half passenger fare for its agents or messengers in charge of its express matter. The said express company further agrees to pay for

any excess of weight over and above five thousand pounds of through freight each way per day between Sedalia and Dennison, and two thousand pounds of through freight each way per day between Parsons and Junction City, one and one-half the local freight rates between the points carried, as per the freight tariff of said railway in use at the time.

It is further agreed on the part of said express company, that it will receive and deliver its freight and packages, and that the trains of said railway company shall not be detained at stations beyond their schedule time of leaving. The said express company shall make a daily report of the weights of all freight carried, which reports the said railway company shall have the right to verify by such means as they may elect, showing where from and where to, and in case the through freight on any day falls short of the amounts heretofore named, enough way freight, figured at one and one-half local freight rates, may be added to make up the deficiency. Payments are not to be made later than the tenth of the month next after the one in which the service is performed.

It is further agreed that all express matter from points on or north of the Missouri Pacific Railroad, and all that comes from any point beyond or east of St. Louis, *via* that city or originating in that city, for points on the line of the Missouri, Kansas & Texas Railway, or beyond, is to be brought on the said line at Sedalia, and no business for this road is to be done, or freight of any kind to be received, delivered at Vinita, except such as originated at or is destined to points on the St. Louis & San Francisco Railroad, south and west of Pacific, Mo.

It is further agreed by the said Missouri, Kansas & Texas Railway Company, that it will not itself, nor will it permit its baggage masters, conductors or other employés, to carry any freight, money or other package in its baggage cars, for pay, nor will it allow any other company, firm or person the privilege of carrying freight on its passenger trains at any less rate of payment per day, or upon any better terms in any way, than is afforded to said Pacific Express Company under this agreement. This agreement shall be in effect on the first day of February, A. D. 1881, and remain in force for one year, and thereafter until either company, wishing to modify the same, shall give to the other thirty days' written notice to that effect.

THE MISSOURI, KANSAS & TEXAS RAILWAY.

(Signed) By A. A. Talmage, *General Manager.*

THE PACIFIC EXPRESS COMPANY.

(Signed) By E. M. Morsman, *General Manager.*

Memorandum of an agreement made this 31st day of January, A. D. 1881, by and between the Missouri, Kansas & Texas Railway Company, by A. A. Talmage, its General Manager, party of the first part, and the Pacific Express Company, by E. M. Morsman, its General Manager, party of the second part, witnesseth:

The Missouri, Kansas & Texas Railway Company will permit the Pacific Express Company to do an express business over the following lines of road, to wit: That part of the railroad running from Hannibal, Missouri, on the north, to Sedalia, Missouri, on the south, on the following terms and conditions:

The Missouri, Kansas & Texas Railway will furnish for the Pacific Express Company sufficient space in its baggage cars, to be hauled on passenger trains, between Hannibal, Missouri, and Sedalia, Missouri, for three thousand pounds of through freight each way, each day that a train is run, and for one agent or messenger, who shall have charge of the express, and a safe for money and valuable packages. As compensation to the railway company, for the privileges furnished as herein provided, the said Pacific Express Company agrees to pay to the said railway company the sum of forty dollars per day for each and every day that a passenger train is run, and one-half passenger fare for its agents or messengers in charge of its express matter. The said express company further agrees to pay for any excess of weight over and above three thousand pounds of through freight each way per day, between Hannibal and Sedalia, one and one-half the local freight rates between the points carried, as per the freight tariff of said railway in use at the time.

It is further agreed on the part of said express company, that it will receive and deliver its freight and packages, and that the trains of said railway company shall not be detained at stations beyond their schedule time of leaving. The said express company shall make a daily report of the weights of all freight carried, which reports the said railway company shall have the right to verify by such means as they may elect, showing where from and where to; and in case the through freight on any day falls short of the amounts heretofore named, enough way freight figured at one and one-half local freight rates may be added to make up the deficiency. Payments are not to be made later than the tenth of each month next after the one in which the service is performed.

It is further agreed by the said Missouri, Kansas & Texas Railway Company, that it will not itself, nor will it permit

its baggage masters, conductors, or other employés, to carry freight, money or other packages in its baggage cars for pay; nor will allow any other company, firm or person the privilege of carrying freight on its passenger trains at any less rate of payment per day, or upon any better terms in any way, than is afforded to said Pacific Express Company under this agreement.

This agreement shall be in effect on the 1st day of February, A. D. 1881, and remain in force for one year, and thereafter until either company wishing to modify the same shall give the other thirty days' written notice to that effect.

THE MISSOURI, KANSAS & TEXAS RAILWAY CO.
(Signed) By A. A. TALMAGE, *General Manager.*
THE PACIFIC EXPRESS COMPANY.
(Signed) By E. M. MORSMAN, *General Manager.*

And defendant avers that it is by reason of these said contracts that said express company is now carrying on its said express business upon and over the lines of road belonging to this defendant.

The defendant, further answering, admits that the said defendant is a public corporation, created by the Legislature of the Territory of Kansas; but denies that such corporation was created by aid of *material assistance* afforded by it and its municipalities; and admits that it was created for the public good, and that its charter imposes upon it the duties and obligations of a common carrier, and that among such duties and obligations is the duty of receiving and carrying express matter and freights for all persons upon the same and equal terms; and that such duty is due to every citizen, and in an equal measure to each; and that the public has a correlative right to demand and receive transportation for all of its express matter, whether tendered personally or by a representative, upon the same terms and conditions as such matter and freights are carried for others; and that the defendant has no lawful right to refuse to perform its duties or to discharge its obligations in this regard, but is bound to serve all with indifference and equal readiness, and cannot

consent to carry for one and refuse to carry for another, or exercise, either directly or indirectly, unreasonable discrimination in terms, facilities or accommodations, or deprive any portion of the public of its common right in that regard.

The defendant, further answering, denies that the contract between said Pacific Express Company and this defendant is or will be violative of the duties and obligations of the said defendant; or inconsistent with the rights of the public; or will prevent lawful competition in business; or will be in restraint of trade, or will create a monopoly, or will be void at the common law.

The defendant, further answering, denies that, if the said defendant undertakes, on and after the 1st day of January, 1881, to conduct the express business, as such business has been practically defined by the demands of the public in relation thereto, it will so undertake the same without lawful or charter authority therefor, and without legal right to a monopoly thereof, or to the sole and exclusive enjoyment of its railway facilities in the conduct thereof; or that, in such event, the said Adams Express Company will still have, as representing the public as aforesaid, legal rights in the premises to be protected by this court, by its decree to be made herein; or that it will be entitled to demand and to receive from the said defendant, and at a compensation not exceeding the cost thereof to it, the same facilities and accommodations for transacting the express business over the lines of the said defendant's railway as may be accorded by the said defendant to itself; and that it will be entitled to have all its express matter transported over the line of the said defendant's railway, on the payment of the cost of such transportation, or at such rates for freight or toll as may be just and reasonable and not in excess of those authorized by law, and upon the same trains, and with like accommodation thereon, and at depots and sta-

tions, as the said defendant may accord to itself in the transportation of such express matter as it may carry, and with a reasonable deduction therefrom as a just compensation for the accessorial service rendered by the said Adams Express Company on, beyond and off the lines of the said defendant, in the collection of express matter from shippers or consignors, and the delivery of the same to consignees, and the custody thereof, by means of messengers, horses and wagons, as is in said bill set forth, and which accessorial service the said Adams Express Company does not need or require at the hands of the said defendant, but is now performing and rendering for itself, as is in said bill set forth. On the contrary thereof, this defendant distinctly asserts that it has a right, under its charter, to conduct and carry on the express business, as defined in said bill, and to exclude any and all rival companies from the enjoyment of its property, facilities, rights and franchises, of which it is the exclusive owner, for which it has paid large sums of money, and which it is not compelled by law to divide with any other or rival company.

The defendant, further answering, denies that in the event that the said defendant, during the pendency of this suit, undertakes to conduct and does conduct for itself, the express business over its said lines of railway, said plaintiff has offered to comply with all the proper rules and regulations of the said defendant in reference to the conduct of said business, or is willing and ready, or has offered to pay all the reasonable compensation, freight or toll which this defendant may lawfully demand for the transportation of express matter and the continuation of the needful railway facilities as aforesaid therefor. And defendant denies that it intends to conduct an express business itself over the lines of its said railroad in any manner, as alleged by plaintiff.

The defendant, further answering, denies that the said Ad-

ams Express Company is now in the possession of the good-will of its customers, but admits that at the time of the filing of plaintiff's bill it was daily occupied in the conduct of its business over a portion of the lines of the said defendant's railway, and denies that it will irreparably injure the business of the said Adams Express Company if said company shall be ejected or excluded from the lines of the defendant's railway, even in the event of the said defendant undertaking hereafter to conduct its own express business, or that there is no legal or practical necessity for any exclusion of the said express company from the lines of railway of the said defendant, or that the said express company is willing or has offered to pay as alleged in said bill.

The defendant, further answering, admits that the said defendant is a public corporation, operating a public highway, and a common carrier under the laws, statutes and charter aforesaid, and exercises thereunder a public office for the public good, and that as such it is amenable to the jurisdiction of a court of equity, and admits as an abstract proposition, that such courts are always open and ready to exercise their powers for the purpose of compelling such corporations and common carriers to keep within the limits which the Legislature has thought proper to prescribe for the exercise of their powers, and not to exercise powers beyond those which their acts of incorporation confer, and to proceed, under certain circumstances not existing in this case, by injunction, to prevent illegal injury or destruction to the rights or property of others, and to prevent the execution of some illegal contracts, or illegal exclusion from the enjoyment of public rights, but denies that courts of equity are open to protect all such rights in their fullest extent, or against all and every injury thereto, and denies that this court has the power to protect the said Adams Express Company in the premises, or that said Adams

Express Company hath made any showing in its bill which entitles it to any consideration in a court of equity.

The defendant, further answering, says that as to the averments contained in the forty-first paragraph of plaintiff's bill, the same are in no manner relevant to this cause; and that the defendant has no knowledge or information as to the truth thereof, and because defendant has no knowledge or information as to the truth thereof, it neither admits nor denies the same; but, if the same, or any part thereof, is considered by this honorable court to be material or in any manner pertinent to the issue herein, defendant demands the plaintiff be required to strictly prove the same.

This defendant, further answering, avers that under and by virtue of its charter, rights and privileges, and the laws and statutes of the State of Kansas, and of the other States and Territories into or through which it operates a line of railway, it has constructed and caused to be constructed its said line of railway, with numerous branches, and has leased other lines connected therewith, and now controls more than ——— miles of railroad in the States and Territory aforesaid, which said lines of railroad, so controlled and operated by this defendant, are of the aggregate value of more than ——————— of dollars, (———————,) and this defendant is entirely solvent and abundantly able to respond to any judgment for damages which the said plaintiff or the said Adams Express Company may or might obtain against it for any breach of its contract with said Adams Express Company, or any violation of its duties to said company in respect to the transportation of any goods, wares, merchandise or other valuable thing which the said Adams Express Company may desire to have transported over its said line of railway.

This defendant, further answering, alleges that its said

lines of railroad are largely constructed and operated through new and sparsely-settled regions, and there is not at the present time, and will not be for many years, a sufficient amount of express business, as the same is described and defined in the plaintiff's bill, to require the services of more than one express company to furnish full and ample facilities for the conduct of such business.

Defendant, further answering, avers that its lines of railroad, and the lines of railroad controlled and operated by it, have for the most part been recently built, and that the defendant has for several years been engaged in pushing forward its line of railroad in the direction of the southwest, through a new and sparsely-settled region, as aforesaid; and while scrupulously endeavoring to perform all its duties to the public, has been devoting its energies in pushing forward the construction of said lines of railroad; that for the above reasons, among others, this defendant has not been able to procure, and does not now have, sufficient cars, engines and other suitable facilities, to furnish each of the numerous express organizations in the United States, numbering 460, as averred in said bill, with proper accommodations and conveniences for the transaction of the express business upon and over its lines of railroad; and defendant avers that it would be unjust and unreasonable to arbitrarily require this defendant to procure and keep on hand at all times such cars, engines, motive power, and other facilities, as would be required to accommodate all the express companies in the country, should they demand the right to do business over said line. And defendant avers, that it observes and conforms to all its legal obligations in the premises, when it keeps on hand and ready to be used sufficient cars, engines and motive power to accommodate the amount of express business done upon its line of road, which business this de-

fendant distinctly avers has heretofore been done, and can now be done, satisfactorily to the public by one express company. And defendant avers that it is ready and willing to furnish additional express facilities to any responsible company requiring the same, upon reasonable notice, so as to enable this defendant to provide the necessary facilities, and upon reasonable assurance and security that such express company so demanding the use of such facilities will pay for the same a reasonable amount, and will use the same a reasonable length of time, or will pay this defendant such an amount as may cover the loss and damage defendant may sustain by the failure of said express company to continue its business. Defendant submits that it would be most unjust and inequitable to compel it to be ready at all times to furnish facilities to express companies to transact business over its line, unless such express companies are compelled to employ such facilities continuously, so that this defendant may not suffer loss or harm by the capricious abandonment of said business by such express company, if the same should not prove remunerative to said express company.

Defendant avers, that after the termination of said contract between it and the said Adams Express Company, the said last-mentioned company made no demand upon this defendant for express facilities — served no notice upon this defendant that it would require the same, or that it intended to demand the same; but on the contrary thereof, instituted this suit for the purpose, as this defendant is informed and believes, of annoying and harassing this defendant, and compelling it by vexatious and costly litigation to permit it to do business upon defendant's said line at an unreasonably low compensation, or to pay it a large sum as an inducement to desist from said vexatious proceedings.

Defendant, further answering, avers that the contract which

it had entered into with said Adams Express Company, set forth in said plaintiff's bill, was unjust and unreasonable, and it was defendant's duty to the public, as well as to itself, to terminate it. And defendant avers that, with due and proper regard for the interests of the public, it made and entered into the contract with the Pacific Express Company, hereinbefore set forth, which contract was and is more just and remunerative to this defendant than the said contract with the said Adams Express Company; and that the compensation agreed to be paid to this defendant by the said Pacific Express Company is just and reasonable, and ought to be paid by any express company doing business over this defendant's line of road.

And defendant, further answering, avers that since the execution of the contract between this defendant and the said Adams Express Company set out in plaintiff's bill, said Adams Express Company entered into a certain illegal and immoral combination with the American Express Company and the United States Express Company, called a "division of territory," by which it was agreed that said other two companies, other than the Adams Express Company, would not compete for business in the territory through which this defendant's line of railroad extended.

Defendant avers that said arrangement and division of territory resulted in great losses to this defendant and in great damage and inconvenience to the public generally.

Defendant made numerous efforts to break up the aforesaid division of territory and to secure the services of some other express company to transact the express business upon its line; but the only two express companies whose business facilities were such that they could operate defendant's line were the said American and United States Express Companies, and both of said companies refused to make any agreement or

arrangement with this defendant, because they were parties to said division of territory.

Defendant says that by reason of such arrangement express matter destined for points on defendant's road, which were also accessible by other lines of road, was almost driven off defendant's line, and given to such other and rival lines, thus greatly injuring defendant's business, and the receipts and emoluments from its contract with said Adams Express Company.

The defendant says, that said state of things continued until defendant was able to make said contract with the Pacific Express Co.; that said contract is just and equitable, and will serve to emancipate this defendant and the public along the line of this defendant's road from the unjust, oppressive and illegal monopoly which the said Adams Express Company has heretofore enjoyed upon said defendant's line of road.

And the defendant, further answering, avers that the facilities which it now has are only sufficient to accommodate the business of one express company, and that one express company is amply able to transact all the business of that nature along the line of defendant's railroad; that defendant has entered into said contract with the Pacific Express Co. to furnish it, on and after January 1st, 1881, the amount of car-room, motive power and other facilities therefor, which prevents it from furnishing equal facilities to any other company, until the same can be manufactured; and defendant avers that said contract with the Pacific Express Company is reasonable, legal and just. And this defendant submits to this honorable court, that none of the matters in said plaintiff's bill mentioned and complained of are matters in respect to which the plaintiff is entitled to relief in a court of equity; and this defendant asks to have the same benefit of defense thereto as if

it had demurred to said plaintiff's bill; and this defendant denies all and all manner of unlawful combination and confederacy wherewith it is charged in and by the said bill; and it denies each and every allegation of the said bill not hereinbefore admitted or expressly denied. All which matters this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct; and it humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,

By JAY GOULD, *President.*

SUPPLEMENTAL BILL.

To the Judges of the Circuit Court of the United States, for the District of Kansas:

IN EQUITY.

William B. Dinsmore, a citizen of the State of New York, and a resident therein, as the President of the Adams Express Company, and a shareholder therein, brings this, his supplemental bill of complaint, against the Missouri, Kansas & Texas Railway Company, a corporation created according to the laws of the State of Kansas, and owning and operating a line of railway as a public highway within said State, and thereupon your orator complains and says:

I. Since the filing of the original bill herein, and which was so filed on or about the 27th day of December, 1880, and the service upon the said defendant of the subpena herein, certain other and further facts have transpired, which this plaintiff is advised and believes that it is necessary, right and proper should be brought before this court, by way of supplemental bill, or by way of supplement to the original bill herein; and he therefore prays leave to file this, either as a supplemental bill or as a supplement to said original bill, under and pursuant to the rules and practice in such case made and provided.

II. Since the filing of the said original bill, the said defendant has answered the same, and, in so doing, has set forth in its answer, on page 29 thereof, and to which this plaintiff refers, a contract between itself and the Pacific Express Company in said bill mentioned, and which said contract is alleged to have been executed on the 31st day of January, 1881, to take effect on the 1st day of February, 1881.

III. The said contract between the defendant and the said Adams Express Company, in said original bill set forth, contained among other provisions the following:

"3. As part compensation to the railway company for the privileges furnished by it as herein provided, the express company will pay to the railway company monthly one hundred dollars per day for each and every day that trains are run over the railway, or any part thereof.

* * * * * *

"5. The railway company agree further, that they will not carry freight or packages for pay in their baggage cars on passenger trains, nor allow their conductors or baggage masters or other employés to do so, during the existence of this agreement, nor will they allow any other company, firm or person the privilege of carrying freight on their passenger trains at any less rate of payment per day, or any greater weight in a car, or upon any better terms in any way, than is granted to said express company under this agreement."

IV. He avers that the said compensation of one hundred dollars per day in said clause of said agreement provided was, by the consent of both parties thereto, subsequently increased to one hundred and seventy-five dollars per day, and that the said Adams Express Company were paying at and after that rate at the time of the commencement of this suit.

V. He avers that the said agreement between the said defendant and the said Pacific Express Company contained among other provisions the following:

"As compensation to the railway company for the privileges furnished as herein provided, the said Pacific Express Company agrees to pay to the said railway company the sum of two hundred and twenty-five dollars per day for each and every day that a passenger train is run. * * * It is further agreed by the said Missouri, Kansas & Texas Rail-

way Company that it will not itself, nor will it permit its baggage masters, conductors or other employés to carry any freight, money or other packages in its baggage cars for pay, nor will it allow any other company, firm or person the privilege of carrying freight on its passenger trains at any less rate of payment per day, or upon any better terms in any way than is afforded to said Pacific Express Company under this agreement."

VI. He avers that since on or about the said first day of February, 1881, the said Adams Express Company and the said Pacific Express Company have both been engaged in the conduct of an express business over the lines of the defendant's railway, and are both now so daily engaged.

VII. He avers that the sum of one hundred and seventy-five dollars per day, so heretofore paid by the said Adams Express Company, was paid by it when it was in the sole enjoyment of the express business over the defendant's line, and was as large a sum as the said defendant could reasonably or justly demand for such sole enjoyment of its express facilities.

VIII. He avers that the sum of two hundred and twenty-five dollars per day, so nominated in the said contract of the said Pacific Express Company, is an advance of fifty dollars per day, or, for three hundred and thirteen working days in the year, an advance of fifteen thousand six hundred and fifty dollars per annum over the sum of one hundred and seventy-five dollars per day, so heretofore paid by the said Adams Express Company.

IX. He avers that the sum of two hundred and twenty-five dollars per day is not a just or a reasonable sum for the Adams Express Company or any other express company to pay, even for the sole enjoyment of express facilities over the defendant's lines, nor is the same a just or reasonable sum

for the Adams Express Company, or any other company, to pay for such facilities, when the same and the business pursued thereby are divided, as they now are divided between two express companies.

X. He avers that, during the year 1880, the said Adams Express Company paid the said defendant for transportation the sum of $51,700, for which the defendant transported for said express company 1,336,637 pounds or 668 tons of express freight, or at the rate of $77.33 per ton for the 590 miles of the defendant's lines occupied by the said express company, or at the rate of 13.1 per ton per mile. The entire receipts of the said Adams Express Company from the said defendant's lines during the same year were $80,612.75, of which the said defendant received $51,700, or 77.1 per cent. The ordinary payments by the express companies to the railway companies do not exceed 40 per cent. of the gross receipts, and the defendant has received, under said contract of one hundred and seventy-five dollars per day, 37.1 per cent. more than the other railway companies in the United States have demanded and received for similar services rendered to the express companies generally.

XI. He avers that the defendant's line, so far as local express business is concerned, is not a profitable line for an express company to operate; that it is a necessary link for the Adams Express Company in its chain of inter-State commercial intercourse between the Eastern and Western and the Southern States, and in the conduct of the inter-State commerce committed to its care; that it is not and never has been a source of profit or income to the Adams Express Company, and that its main value consists in enabling such express company as operates the same to receive and transport express matter to and from points beyond its termini, and going to or coming from different States.

XII. He avers, as he has hereinbefore averred, that the sum of one hundred and seventy-five dollars per day was a just, full, reasonable and adequate compensation to the defendant for all the facilities which it afforded to the Adams Express Company when it was so as aforesaid in the sole enjoyment thereof, and that the sum of two hundred and twenty-five dollars per day is not a legal, or a just, or a reasonable sum to require the said Adams Express Company to pay for such facilities when the enjoyment of the same and the business incident thereto are divided between the said Adams Express Company and the said Pacific Express Company.

XIII. He avers that, at or about the time of the filing of the said answer, and on or about the 12th and 13th of March, 1881, the said Adams Express Company offered to arrange with the defendant for a continuance of the enjoyment of the said facilities on its lines, and to continue the payment of the said sum of one hundred and seventy-five dollars per day until the further order of this honorable court herein, or to pay the said sum of two hundred and twenty-five dollars per day until such order, if the said defendant would undertake and promise to refund the said express company such proportion thereof, if any, as this court might determine to be in excess of a just and reasonable sum to be paid by it, and that such offer was declined.

XIV. He avers, upon information and belief, that the said contract with the said Pacific Express Company is an illusory one, and that the express business upon the defendant's line does not warrant or justify the undertaking or the requirement to pay the said sum of two hundred and twenty-five dollars per day therein specified.

XV. He avers that the said Adams Express Company is now in the possession of the good-will of its customers, and is daily occupied in the conduct of its business over the lines of

the said defendant's railway, and in the conduct of an inter-State commerce thereon, and that it will be greatly injurious to the business of the said Adams Express Company if it should be ejected or excluded therefrom, and that there is no legal or practical necessity for such or any exclusion of the said express company therefrom, and that the said Adams Express Company is willing as aforesaid to conform to all proper rules and regulations of the said defendant, and offers to pay, as it hereby does, such just and reasonable compensation as this honorable court shall determine and decree for the continuance and enjoyment of said facilities as are needed by the said Adams Express Company over the defendant's line, and such as have been heretofore accorded to it, and such as are stipulated and provided for in said contract with the said Pacific Express Company.

Wherefore this plaintiff prays—

1. That this bill may be filed as a supplemental bill, or as a supplement to the original bill herein.

2. That the said defendant may be adjudged and decreed to receive for transportation express matter and messengers of the Adams Express Company at all its depots and stations, and transport the same to destination and without molestation or hindrance, and to afford all the necessary facilities therefor on its trains and at its depots and stations, and upon the same trains, and to the same extent as it now affords or has agreed by its said contract to afford, the same to the said Pacific Express Company, and for just, lawful and reasonable compensation as this honorable court, in view of all the circumstances, may determine.

3. That a provisional or preliminary, and a permanent injunction may issue herein, restraining the said defendant from interfering with the enjoyment by the Adams Express Company of all the express facilities over the defendant's line

which have been heretofore accorded to such express company, and from preventing or interfering with the enjoyment by the said Adams Express Company of the same facilities upon the line of the defendant's railway for the conduct of the express business of the said Adams Express Company thereon as are afforded by the said defendant to the said Pacific Express Company under its said contract set forth in the answer herein or otherwise, so long as the said Adams Express Company shall be ready and willing, and shall offer to pay such compensation therefor as this court may determine and decree to be just and reasonable, and to observe such reasonable rules and regulations of the said defendant as are imposed upon the said Pacific Express Company.

4. That the said plaintiff may have such other or further or different relief herein as the nature of the case may require, and as to the court may seem meet, together with the relief originally prayed in and by said original bill, and that the defendant may be decreed to answer this bill in like manner as this plaintiff has heretofore prayed that it might answer such original bill.

And this plaintiff will ever pray, &c.

WILLIAM B. DINSMORE,
As President of the Adams Express Company, and a shareholder therein.

BLAIR & PERRY,
CLARENCE A. SEWARD,
F. E. WHITFIELD,
Solicitors, and of Counsel.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.

On this 31st day of March, 1881, before me personally appeared William B. Dinsmore, to me known to be the plaintiff in the foregoing supplemental bill of complaint, and who

has signed the same; and he being by me duly sworn, did depose and say that he has read the foregoing supplemental bill, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes the same to be true.

[L. S.] JOSEPH GUTMAN, JR.,
United States Commissioner, Southern District of New York.

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REPLICATION.

IN THE CIRCUIT COURT OF THE UNITED STATES,

IN AND FOR THE DISTRICT OF KANSAS.

WM. B. DINSMORE, as President of the Adams Express Company, and a shareholder therein, *Complainant*,

vs.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *Defendant.*

REPLICATION OF THE COMPLAINANT TO THE ANSWER OF THE DEFENDANT.

This repliant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendant for replication thereunto, saith: That he doth and will aver, maintain and prove his said bill to be true, certain and sufficient in the law to be answered unto by the said defendants; and that the answer of said defendants is very uncertain, evasive and insufficient in the law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained materially or effectually in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true. All which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

BLAIR & PERRY,
C. A. SEWARD,
F. E. WHITFIELD,
Solicitors for Complainant.

Indorsed: "No. 3307, W. B. Dinsmore, as President, etc., *vs.* M. K. & T. Ry. Co.—Replication of complainant to

answer of defendant, filed March 15, 1881.—A. S. THOMAS, Clerk.—BLAIR & PERRY, C. A. SEWARD, F. E. WHITFIELD, Solicitors for Complainant."

UNITED STATES OF AMERICA,
DISTRICT OF KANSAS, } ss.

I, A. S. Thomas, Clerk of the Circuit Court of the United States of America for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the replication of the complainant to the answer of the defendant in the suit of Wm. B. Dinsmore, as President of the Adams Express Company, and shareholder therein, *vs.* The Missouri, Kansas & Texas Railway Company, No. 3307 in said court, filed March 15, 1881.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said District of Kansas, this 26th day of December, A. D. 1882.

[SEAL.] A. S. THOMAS, *Clerk.*

DEFENDANT'S DEMURRER.

IN THE UNITED STATES CIRCUIT COURT

FOR THE DISTRICT OF KANSAS.

WILLIAM B. DINSMORE, as President of the Adams Express Company, and a shareholder therein, *Complainant*,

vs.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *Respondent.*

The respondent, the Missouri, Kansas & Texas Railway Company, by protestation, not confessing all or any of the matters or things in the said complainant's original and supplemental bill contained to be true in such manner and form as the same are therein set forth and alleged, does demur thereto, and for cause of demurrer shows:

1. That it appears from the statements in said bill of complaints that numerous other persons therein referred to as shareholders of the Adams Express Company are necessary parties to said bill.

2. That it appears from the statements in said bill of complaint, that the Adams Express Company is an incorporated association, with a president and other officers, and yet this suit was not instituted in the name of said corporation, nor is it anywhere stated in said bill that the directors or managing officers thereof ever refused to institute this suit in the name of said corporation, or that they ever were requested or desired to do so.

3. That it does not appear from the statements in said bill of complaint, that the several parties designated therein as shareholders, or any of them, have any interest whatever in this suit, or in its results, or that the ends sought to be attained will result in benefit to all or any of said shareholders.

4. That it appears from the statements in said bills of complaint, that, at the time this suit was commenced, there had been issued, and were then outstanding, one hundred and twenty thousand shares of the capital stock of said corporation, which were held and owned by two thousand five hundred different persons, none of whom were residents of the State of Kansas, in which this suit was instituted; and that only one of shareholders, namely, the plaintiff in this suit, who is designated as a shareholder without stating the number of shares owned by him, is named as complainant in said bill, and there is no averment that any one, or more, of the two other two thousand four hundred shareholders in said corporation is interested in this suit, or in its results, or that one or more of them requested or desired this suit to be instituted, or knew that it was to be instituted.

5. That the corporation has not been made a party to this suit.

6. That all the shareholders in said incorporated association should have been made parties, or a part should have filed a bill stating the number and value of the shares held by them, on behalf of themselves and all others who might elect to come in and make themselves parties.

7. That no reason is stated in said bills of complaint why the corporation did not institute this suit, or was not made a party thereto.

8. That it appears from the statements in said bills of complaint that this court has no jurisdiction of this case.

9. That it does not appear from the statements in said bills of complaint that this suit is against the directors, trustees, or other officers of said corporation; that any fraud has been committed, any trust betrayed, or any duty violated.

10. That said bills of complaint are multifarious; that in said bills of complaint there are many distinct matters and

things stated, in many of which, as appear from said statements themselves, this defendant is in no way interested; and by reason of such distinct and irrelevant matters and things, the said bills are drawn out to an unreasonable length, and this defendant is compelled to take a copy of the whole thereof; and by thus forming such distinct and irrelevant matters and things together, which do not depend on each other, and have nothing to do with each other, the proceedings in the progress of this suit will be intricate and prolix, and the defendant will be put to great and unnecessary charges and expenses.

11. That there is no equity in said bills of complaint, or either of them.

12. That the complainants have a full, complete and adequate remedy at law.

13. That the said bills of complaint, nor either one of them, do not state facts sufficient to constitute a cause of action in a court of equity.

THOS. J. PORTIS AND
WILLIAMS & DILLON,
Attorneys for Defendant.

UNITED STATES CIRCUIT COURT.
DISTRICT OF KANSAS.

WILLIAM B. DINSMORE, as President of the Adams Express Company, and a shareholder therein,

vs.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

It is hereby stipulated that the above cause may be brought on for argument before the Honorable George W. McCrary, Circuit Judge, at St. Louis, at such time in January next as the said Judge may appoint, for hearing arguments in the other cases involving similar questions.

Dated October 3d, 1881.

C. A. SEWARD,
Solr., and of Counsel for Plaintiff.
THOS. J. PORTIS,
Att'y. for Def't.

OPINION.

MILLER, *Circuit Justice.*

In these cases, argued before me at St. Louis, with Judges McCrary and Treat, I can do no more than present certain general conclusions at which my mind has arrived in regard to the propositions argued by counsel:

1. I am of the opinion that what is known as the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized.

That while it is not possible to give a definition in terms which will embrace all the classes of articles so usually carried and to define it with precision by words of exclusion, the general character of the business is sufficiently known and recognized as to require the court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads.

That the object of this express business is to carry small and valuable packages rapidly, in such a manner as not to subject them to the danger of loss and damage, which to a greater or less degree attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise and the like.

2. It has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent or messenger of the person or company engaged in it, and to refuse permission to this agent to accompany these packages on steamboats or railroads on which they are carried, and to deny them the right to the control of them while so carried, is destructive of the business and of the rights which the public have to the use of the railroads in this class of transportation.

3. I am of the opinion that when express matter is so confided to the charge of an agent or messenger, the railroad company is no longer liable to all the obligations of a common carrier, but that when loss or injury occurs, the liability depends upon the exercise of due care, skill and diligence on the part of the railroad company.

4. That under these circumstances there does not exist on the part of the railroad company the right to open and inspect all packages so carried, especially when they have been duly closed or sealed up by their owners or by the express carrier.

5. I am of the opinion that it is the duty of every railroad company to provide such conveyance by special cars, or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business.

If the number of persons claiming the right to engage in this business at the same time, on the same road, should become oppressive, other considerations might prevail; but until such a state of affairs is shown to be actually in existence in good faith, it is unnecessary to consider it.

6. This express matter and the person in charge of it should be carried by the railroad company at fair and reasonable rates of compensation; and where the parties concerned cannot agree upon what that is, it is a question for the courts to decide.

7. I am of the opinion that a court of equity, in a case properly made out, has the authority to compel the railroad companies to carry this express matter, and to perform the duties in that respect which I have already indicated, and to make such orders and decrees, and to enforce them by the ordinary methods in use necessary to that end.

8. While I doubt the right of the court to fix in advance the precise rates which the express companies shall pay and the railroad companies shall accept, I have no doubt of its right to compel the performance of the service by the railroad company, and after it is rendered, to ascertain the reasonable compensation and compel its payment.

9. To permit the railroad company to fix upon a rate of compensation which is absolute, and insist upon the payment in advance or at the end of every train, would be to enable them to defeat the just rights of the express companies, to destroy their business, and would be a practical denial of justice.

10. To avoid this difficulty, I think that the court can assume that the rates, or other mode of compensation heretofore existing between any such companies, are *prima facie* reasonable and just, and can require the parties to conform to it as the business progresses, with the right to either party to keep and present an account of the business to the court at stated intervals, and claim an addition to, or rebate from, the amount so paid.

And to secure the railroad companies in any sum which may be thus found due them, a bond from the express company may be required in advance.

11. When no such arrangement has heretofore been in existence, it is competent for the court to devise some mode of compensation to be paid as the business progresses, with like power of final revision on evidence, reference to master, etc.

12. I am of the opinion that neither the statutes, nor constitutions of Arkansas or Missouri, were intended to affect the right asserted in these cases; nor do they present any obstacle to such decrees as may enforce the rights of the express companies.

On the same 21st day of February, 1882, as appears by the transcript, a further order was made in said cause and entered in said Clerk's office on the 23d day of February, 1882, in these words:

"William B. Dinsmore, as President of Adams Express Company, &c., against The Missouri, Kansas & Texas Railway Company. In this case it is ordered that the injunction heretofore granted shall remain in force until otherwise ordered by the court. Counsel will be heard at a convenient time upon the question of the form of the decree to be herein entered in pursuance of the opinion of the court, announced by Mr. Justice Miller, and herewith filed, February 21, 1882. GEO. W. MCCRARY, *Circuit Judge.*"

PETITION FOR APPOINTMENT OF MASTER.

And on this day, to wit, June 8, 1882, the Clerk of said court made an entry on the order book of said court in said entitled suit, which entry is in the words and figures following, to wit:

To the Honorable the Judges of the said Circuit Court:

Your petitioner, the complainant above mentioned, now files his petition herein, and respectfully represents:

That, at and prior to the 27th day of December, 1880, the Adams Express Company was in the sole and exclusive possession of express facilities upon the line of defendant's railway, for which it was paying a rental of $175 per day; that about the date aforesaid, which was the time of complainant filing his original bill in this cause, the defendant made a contract with the Pacific Express Company, which thereafter also operated its express on said railway, whereby the express business originating along the line of defendant's railway was divided between the two express companies, and the revenue of the Adams Express Company from said business reduced

more than fifty per centum; that the provisional order of injunction in this cause, granted and made about the day of , 1881, required said Adams Express Company to pay said defendant railway company for the express facilities afforded it during the litigation the sum of $175 per day, which was to be payment on account of what was actually due for such services, which amount was to be ascertained and settled thereafter as the court should determine; that ever since such provisional or temporary order the said Adams Express Company has been paying for said facilities, and this decreased business, the sum of $175 for each and every intervening day; that the sum actually paid by said Adams Express Company is largely in excess of what should be paid, or what is actually due for said services, computed upon the basis of fifty per centum above actual or prescribed rates for ordinary freight, or upon any other just or reasonable rate or basis of compensation; wherefore, in order to settle permanently what was and is and will be, up to the termination of the proceedings originated by this petition, a just and fair compensation for the services rendered, and to be rendered, and to determine upon what side and to what amount the balance lies, your petitioner respectfully prays that the questions raised herein be referred to some suitable person to be appointed by the court, or agreed upon by and between the parties, as a Special Master of this court in this cause, with all the powers of Masters conferred by the rules of practice prescribed by the Supreme Court of the United States for courts of equity of the United States, and particularly specified in rules 74 to 83 thereof, both inclusive, and with power also to re-examine any of the witnesses heretofore examined herein, and to use as evidence all the testimony heretofore taken in this cause, to conduct the proceedings before him, and to take testimony in the cause at such place within or without the District of

Kansas as he may designate, and that he be required to take testimony at St. Louis, Cincinnati and New York, upon the demand of either party herein; that he be required to take and state an account of the express business conducted by the Adams Express Company over the defendant's lines of railway from the commencement of this suit up to the termination of the proceedings before such Special Master, and to fix and determine what was and is a just and reasonable compensation to be paid by the Adams Express Company to the defendant for the use and enjoyment of the facilities and privileges accorded to it on the defendant's lines of railway since the commencement of this suit and up to the conclusion of the proceedings before such Special Master, and to report the same to this court, together with the amounts paid by the said Adams Express Company to the defendant for such services from the commencement of this suit up to the date of said Special Master's report; and that said report be accompanied with all the evidence taken before him, or heard or considered by him, whether the same be oral or documentary; and that, upon the filing of said report, and the consideration thereof by the court, such decree may be made thereon as to the measure of compensation as may be just and equitable to both parties in this cause.

And your petitioner, as in duty bound, will ever pray, etc.

C. A. Seward, F. E. Whitfield, Blair & Perry, solicitors for petitioner. [Endorsed]: Filed June 8, 1882.—A. S. Thomas, Clerk; by George M. Holmes, Deputy.

ORDER APPOINTING MASTER.

In the Circuit Court of the United States for the District of Kansas, William B. Dinsmore, as President of the Adams Express Company, and a shareholder therein, Complainant, *vs.* The Missouri, Kansas & Texas Railway Company, Defendant.—In Equity.

And now, at this day, to wit, the [June 8, 1882] day of June, this cause coming on to be further heard upon the petition filed by the complainant herein for the appointment of a Special Master to take and state an account between the parties as to the compensation that should be and has been paid during the litigation, and up to the final termination thereof, and to take and hear testimony in regard thereto, and the same having been fully considered by the court, it is ordered, adjudged and decreed as follows:

I. That the matters in dispute, as above indicated and more fully set forth in complainant's petition, be and the same are hereby referred to W. H. Rossington, Esq., an attorney and solicitor of this court, as Special Master of this court in this cause, with all the powers of Masters conferred by the rules of practice of the Supreme Court of the United States prescribed for the government of courts of equity of the United States, and particularly specified in Rules 73 to 84 thereof, both inclusive, and with power to reëxamine any of the witnesses heretofore examined herein, and to use as evidence any and all testimony heretofore taken in the cause; to conduct the proceedings before him, and to take testimony therein at such places within or without the District of Kansas, as he may designate, and that he may be required to take testimony at St. Louis, Cincinnati, and New York, upon the request of either party herein; that he take and state an account of the express business conducted by the Adams Express Company over defendant's lines of railway since the commencement of this suit, and up to the termination of the proceedings before such Special Master; and that he fix and determine what was and is a just and reasonable compensation to be paid by the Adams Express Company to the defendants for the use and enjoyment of the facilities and privileges accorded to it on the defendant's lines of railway

since the commencement of this suit, and up to the conclusion of the proceedings before such Special Master; and to report the same to this court, together with the amounts paid by the Adams Express Company to the defendant since the commencement of this suit, and up to the date of said report; and that he accompany said report with all the evidence taken and considered by him, whether documentary or oral; and that upon the filing of said report, either party may have leave to apply to the court for such further relief or decree thereon as to said measure of compensation as may be just and equitable.

II. That the compensation of said Special Master be and the same is hereby fixed at twenty dollars per day, and that the same, together with his expenses, shall be paid by the parties hereto in equal proportions or moieties as the said Special Master may from time to time request, and that the ultimate payment of such compensation and expenses abide the further order of this court.—George W. McCrary, Circuit Judge. Indorsed: No. 3307, William B. Dinsmore, as President, etc., *vs.* Missouri, Kansas & Texas Railway Company.—Order appointing Special Master; filed June 8, 1882. A. S. Thomas, Clerk, by Geo. M. Holmes, Deputy.

DECREE.

In the Circuit Court of the United States for the District of Kansas. In Equity.—William B. Dinsmore, as President of the Adams Express Company, and a shareholder therein, Complainant, *vs.* The Missouri, Kansas & Texas Railway Company, Defendant.—And now, at this day, to wit, the 8th day of June, 1882, this cause coming on to be heard, the defendant, by leave of the court, first had and obtained for that purpose, withdrew the answer heretofore filed in this cause, and interposed a demurrer to the bill of com-

plaint of the complainant, which, after argument by counsel, was overruled by the court.

Whereupon the defendant elected to stand upon its demurrer, and this cause came on to be further heard on the bill of complaint filed herein and was argued by counsel and then and there submitted to the court, and the court, on due consideration thereof, do order, adjudge and decree as follows:

I. That the express business, as fully described and shown in the record, is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized, so as to require the court to take notice of the same as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads.

II. That it has become the law and usage, and is one of the necessities of the express business, that the property confided to an express company for transportation should be kept, while in transit, in the immediate charge of the messengers and agents of such express company.

III. That to refuse permission to such messengers or agents to accompany such property on the steamboats or railroads on which it is to be carried, and to deny them the right to the control of the property while so carried, would be destructive of the express business, and of the rights which the public have to the use of such steamboats and railroads for the transportation of such property so under the control of such messengers or agents.

IV. That neither the defendant, its officers, agents or servants, nor either nor any of them, have the right to open or inspect any of the packages or express matter which may be offered to it for transportation by the Adams Express Company, nor to demand a knowledge of the contents thereof, nor

to refuse transportation thereof, unless such inspection be granted or such knowledge be afforded.

V. That it is the duty of the defendant to carry the express matter of the Adams Express Company and the messengers and agents in charge thereof, at a just and reasonable rate of compensation; and that such rate of compensation is to be found and established as a unit, and is to include as well the transportation of such messengers and agents as of the express matter in their custody and under their control.

VI. That since the 23d day of November, 1871, the defendant, and an intermediate receiver and trustee thereof, have afforded to the Adams Express Company all the facilities and privileges needed by said company for the conduct of its express business over the defendant's lines, and that the said company is now in the daily enjoyment of such facilities; that the same were originally afforded under a written contract as set forth in the bill herein; that on the first day of December, 1880, the defendant notified the said Adams Express Company that on the first day of January, 1881, such company would be expected to retire from the operation of the express business on the defendant's road; that it was the intention and purpose of the defendant to exclude the Adams Express Company from its lines on and after the 1st day of January, 1881; that such intention and purpose were restrained by the preliminary injunction order of this court; that after its allowance the said Adams Express Company continued to have, possess and enjoy, and now has, possesses and enjoys all the facilities which it had possessed and enjoyed during the existence of said contract and prior to said injunction; that for the express facilities and privileges so accorded under the said contract to the said Adams Express Company for the conduct of its express business over the defendant's lines, the said Adams Express Company paid to

said defendant as compensation the sum of one hundred and seventy-five dollars per day; that since the commencement of this suit, to wit, the 28th day of December, 1880, the said Adams Express Company has continued to pay said defendant the said sum of $175 per day; that the said Adams Express Company is entitled to have, possess and enjoy a continuance of the said facilities and privileges for the conduct of its said express business on the lines of the defendant's railway, as the same are now had, possessed and enjoyed, and until the further order or decree of this court, at a rate not exceeding fifty (50) per centum more than its actual rates for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account, or for any other express or other corporation, or for private individuals, which compensation is to be paid by said Adams Express Company on or before the 20th of each month for the preceding month, and that said express company keep and render monthly to the defendant a true account of the services performed for it by said defendant; that on the 31st day of January, 1881, the defendant entered into a contract which is set forth in the defendant's answer heretofore filed herein with the Pacific Express Company, under which it granted to the said Pacific Express Company the facilities and privileges for the conduct of an express business over the defendant's lines which are in said answer specified and set forth; that prior to the making of said contract with the said Pacific Express Company, the said Adams Express Company had been in the sole possession and enjoyment of the express business over and upon the lines of defendant's railways so occupied by the said Adams Express Company, and of the revenues and income therefrom; that since the making of said contract

with the said Pacific Express Company, to wit, from the 31st of January, 1881, the express business over the lines of the defendant therein specified has been divided between said Pacific Express Company and the said Adams Express Company, and the business of said Adams Express Company, and the profits and income thereof, have been thereby and are now continually greatly lessened and diminished.

VII. That it is the duty of the defendant to continue to afford to Adams Express Company the same facilities as the defendant has heretofore afforded and is now affording to it, and as it has heretofore afforded, and is now affording to the said Pacific Express Company, under the contract aforesaid, and all such facilities as are necessary and as have been usually and customarily afforded to either of said companies for the conduct of the express business over the lines of said defendant's railway.

VIII. That it was and is the duty of the said defendant to afford such facilities to the Adams Express Company as above provided, for such compensation as is reasonable and just.

IX. That the defendant has no right to require prepayment for the said express facilities, or payment therefor at the end of every train, or in any other manner than as hereinbefore provided.

X. That the said defendant, its agents, servants, officers and employés, jointly and severally be, and they are hereby severally, permanently and perpetually restrained and enjoined from interfering with or disturbing in any manner, the enjoyment by the Adams Express Company of the facilities now accorded to it by the said defendant upon its lines of railway, branches, leased lines and extensions for the transaction of the business of the said Adams Express Company, and of the express business of the public, confided to

its care, and from interfering with any of the express matter or messengers of the Adams Express Company, and from excluding or ejecting any of its express matter or messengers from the depots, cars or lines of the said defendant as the same have been heretofore and are now enjoyed and occupied by the said Adams Express Company or its agents or messengers, and from refusing to receive and transport in like manner as the said defendant is now doing, and as it has heretofore done over its lines of railway, the express matter and messengers and agents of the said Adams Express Company, and from interfering with or disturbing the business of the said Adams Express Company or its present or former relations in reference thereto with the said defendant in any way or manner whatsoever.

It is further ordered and adjudged and decreed, that the complainant recover of the defendant herein the costs in this cause, taxed at five hundred and three dollars and forty cents ($503.40), with interest from the date of this decree till paid, and that said complainant have execution therefor.

And the said defendant; excepting to all and singular the above findings, orders, decrees, and judgments, prays an appeal of said cause to the Supreme Court of the United States, upon condition that said defendant executes a good and sufficient bond in the sum of one thousand dollars, prepared, executed and conditioned according to the rules of this court in equity cases. GEO. W. MCCRARY, *Circuit Judge.*

No. 3307, William B. Dinsmore, as President and shareholder, &c., Complainant, *vs.* Missouri, Kansas & Texas Railway Company, Defendant.—Decree; filed June 8, 1882.—A. S. Thomas, Clerk."

CERTIFICATE OF COUNSEL TO DEMURRER.

The undersigned, counsel for defendant in this cause, hereby certify that, in their opinion, the foregoing demurrer to complainant's bill and supplemental bill in this cause is well founded in point of law.

THOMAS J. PORTIS,
WILLIAMS & DILLON,
Solicitors for Defendant.

Thomas J. Portis, being duly sworn, deposes and says that he is the regularly employed solicitor and attorney for the defendant corporation, and, as such, has charge of its legal business, and that he knows the foregoing demurrer in this cause is not interposed for delay.—Thos. J. Portis. Subscribed and sworn to before me, this 7th day of June, 1882. —A. S. Thomas, Clerk. The complainant waives all objections to the foregoing affidavit, both as to the form and substance.—Blair & Perry, Solicitors for Complainant.

APPEAL OF APPELLANT.

And on this day, to wit, June 23, 1882, there was filed in the Clerk's office of said court, an application for appeal by defendant, which application for appeal is in the words and figures following, to wit: In the Circuit of the United States, for the District of Kansas.—William B. Dinsmore, as President of the Adams Express Company, and a shareholder therein, respondent, against The Missouri, Kansas & Texas Railway Company, appellant. Now comes the defendant, by its solicitors, and objects and excepts to the decree entered in this cause, and each and every part thereof, and the said defendant, conceiving itself greatly aggrieved by the said decree, and each and every part thereof, prays the court to allow it an appeal therefrom to the Supreme Court of the United States, and that a full and complete transcript of the record

in this cause, together with copies of such entries and papers on file as may be necessary on the hearing of the appeal, be transmitted with all convenient dispatch to the said Supreme Court. June 8, 1882. Thos. J. Portis, Solicitor for Defendant. I hereby certify that, in my opinion, there is good cause for appeal in the above stated cause.—Thomas J. Portis, Solicitor for Defendant. Allowed: C. J. Foster, Judge. [Indorsed:] No. 3307. Wm. B. Dinsmore, President of Adams Express Company, &c., *vs.* The Missouri, Kansas & Texas Railway Company; in the Circuit Court of the United States, for the District of Kansas. Application for appeal by defendant, June Term, 1882. Filed June 23d, 1882.—A. S. Thomas, Clerk, by Geo. M. Holmes, Deputy.

And on this day, to wit, Friday, June 23d, 1882, in the June Term of said court, in the record of the proceedings thereof in said entitled suit, is the following entry, to wit: William B. Dinsmore, as President of the Adams Express Company, &c., *vs.* The Missouri, Kansas & Texas Railway Company. Now at this day comes the defendant and tenders here in court a bond in the sum of one thousand dollars, prepared, executed and conditioned as required in the decree hereinbefore entered in this cause, which said bond is by the court approved and filed, and the appeal heretofore prayed for is granted, and said appeal to the Supreme Court of the United States is hereby allowed.

UNITED STATES OF AMERICA,
DISTRICT OF KANSAS, } ss.

I, A. S. Thomas, Clerk of the Circuit Court of the United States of America for the District of Kansas, do hereby certify the foregoing to be true, full and perfect copy from the record of all the proceedings in the suit of William B. Dinsmore, as President of the Adams Express Company, and a

shareholder therein, *vs.* The Missouri, Kansas & Texas Railway Company — No. 3307 — in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 30th day of August, 1882.—A. S. Thomas, Clerk, by Geo. M. Holmes, Deputy.

SUPREME COURT U. S.
JAN 2 1902
JAMES H. McKENNEY, CLERK

IN THE

Supreme Court of the United States.

[No. 914.]

SOUTHERN EXPRESS CO., - - - *Appellee*,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., *Appellant*.

BRIEF FOR APPELLANT ON MOTION TO DISMISS APPEAL.

BROADHEAD & HAEUSSLER,

Attorneys.

ST. LOUIS: PRINTED BY THE CENTRAL LAW JOURNAL.

IN THE

Supreme Court of the United States.

[No. 914.]

SOUTHERN EXPRESS CO., - - - *Appellee*,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., *Appellant*.

Motion to Dismiss Appeal.

BRIEF FOR APPELLANT.

A motion is made by the appellee to dismiss this appeal for want of jurisdiction in this court, and because the decree in this case was not final.

The case is a peculiar one: it is a bill in equity asking the court, in substance, to determine how business should be conducted between two transportation companies — an express company and a railroad company.

It is an application for what may be called a mandatory injunction, asking the court to enjoin the defendant from refusing to do certain things, and this application is based

upon the assertion in the bill that the complainant is, under the law, entitled to certain privileges and facilities in the conduct of its business, which the defendant has denied or is about to deny to it; that the public is interested in the enjoyment by the complainant of those privileges and facilities; that the law imposes upon the defendant the duty of affording those facilities to the complainant; that they had been enjoyed by the complainant for a long time; that complainant had made extensive preparations for carrying on their business in this particular way, and they demand that they shall continue to have those facilities, and offer to pay a reasonable compensation to defendant for this continued enjoyment; and that if complainant and defendant should, during the pendency of the suit, disagree as to what is reasonable compensation, that the complainant be permitted to bring the matter before the court for its decision.

It appears that in the spring of 1880, the complainant was doing an express business over the St. Louis, Iron Mountain and Southern Railroad, under the provisions of two written contracts — one made April 30th, 1872, between the Iron Mountain Railroad Company and Adams Express Company, which contract was sold by Adams Express Company to the complainant; and another contract, made February 1st, 1874, between the Cairo & Fulton and the Cairo, Arkansas and Texas Railroad, which railroad companies were afterwards, to wit, May 1, 1874, consolidated with the Iron Mountain Railroad Company, forming what is now called the St. Louis, Iron Mountain and Southern Railway Company, the defendant in this suit, and thus it became the owner of both contracts with the complainant — one made by complainant with the railroad company, and the other made by Adams Express Company and assigned to complainant.

By the terms of those two contracts they might be terminated by either party on sixty and thirty days' notice respectively.

These notices were given to the complainant by the railroad company on the 26th of March and the 23d of April, 1880, that the contracts would be terminated on and after a certain date; and on the 15th of May, 1880, the railway company notified the express company that the railway company "had determined to transport all express matter and transact all express business on its own account, and through and by its own officers and agents, on and after the 1st of June next, on its own cars and over its own roads."

On the 21st of May, 1880, the bill in this case was filed.

The bill avers in substance:

1. That the complainant has been and is doing an express business.

2. That the railroad companies cannot do an express business; that they are not only unable, but unwilling to perform it in a manner to serve the public; and that by usage they have surrendered it to the express companies.

3. That the express companies have built up their business upon the express understanding that the railroads would afford all the facilities needed by the express companies for the transaction of their business; or upon the knowledge and belief that the public, through the express companies, had a legal right to compel the granting thereof, and that no railway company has ever had the ability to assume such obligations to the public for the transportation of express matter as those assumed by the express companies.

4. That the principal business of the express companies has been as a medium of exchange of money and collections of negotiable securities, and the transportation of express packages of greater or less value, or where the price was to be collected from the consignee; that railroad companies did not afford these facilities.

5. That the government of the United States has availed itself of these facilities, and that the express companies have been created by the public as their instrumentalities for the transmission of public and private money; and the necessity for their existence is as great as the necessity for the existence of the ordinary vehicles of commercicl intercourse.

6. That the defendant has all the conveniences needed by the Southern Express Company for the transaction of its business.

7. Relying upon the duties and obligations imposed upon the railway company, by law as well as by the *contract*, to afford to plaintiff equal and indiscriminating opportunities and facilities of transportation, and in a manner demanded by the conveniences and necessities of the public, and established by the necessities of the railroad companies, plaintiff made large investments of money in building up its business at stations along the railroad, and in establishing other connecting routes for business, and has built up and now owns and enjoys an express *business*, and *prestige* and *good will* of great value.

8. That plaintiff has provided horses and wagons, drivers, iron safes, and other conveniences to collect and deliver express matter, using its own means and agencies alone.

9. That it has had occasion to forward large sums of money, for which defendant, having its property heavily mortgaged, affords no prompt security in case of loss; and so safety has demanded, and *defendant* has accorded, according to the usage of railroad traffic, the means of forwarding such sums of money in the special care and custody of plaintiff's own agents; otherwise, plaintiff would be denied the opportunities of transporting such money ! ! !

10. That its interest and the preservation of its valuable property demands that it shall continue to have the facilities heretofore enjoyed, and offers to pay a reasonable compensation therefor; and avers that, by reason of the premises and force of the statutes of Missouri, the duty is imposed upon the defendant to always afford plaintiff the means and the facilities of forwarding and transporting, in the *manner established as aforesaid* by *the usage of the express business*, upon reasonable terms, its express matter and *messengers*.

11. That the railroad companies have classified freight according to law, and that the rates of toll or compensation therefor have been provided by law, and that the same cannot be lawfully exceeded by defendant in its charges to complainant, or to the public whom the complainant represents.

12. That it is in the daily custom of making with its own horses and wagons all the collections and deliveries of express freight, as between the public and the railway lines of defendant, which the public cannot conveniently make on its own behalf; that it does not require from defendant any similar service, nor can the defendant lawfully charge it therefor.

13. That complainant will be entitled to have all its express matter transported over defendant's railway at the rates of freight specially provided by law, and by the railroad companies; and that if defendant shall during the pendency of this suit or hereafter undertake to do its own express business, defendant can be legally required to deduct from the charges to be made by it to the public for transportation of express matter, upon all express matter transported by it for the Southern Express Company, a just and reasonable compensation for the accessorial services

rendered by the Southern Express Company, beyond and off the lines of defendant's railway, in the collection of goods from shippers or consignors, and the delivery of goods to consignees by means of horses and wagons, and which accessorial service the Southern Express Company does not require at the hands of defendant.

14. Offers to pay reasonable freight and charges and asks that plaintiff be permitted to do an express business on the line of defendant's road.

15. That a court of equity has the power to compel defendant to keep within the limits prescribed by law, and to proceed by injunction to prevent illegal injury or destruction to the rights of property of others.

Wherefore complainant prays:

1. That during the pendency of the suit the defendant may be restrained from interfering with the facilities now enjoyed by the Southern Express Company, now accorded to it; from interfering with its messengers; from refusing to receive and transport, in the same manner as defendant is now doing, the express matter and messengers of the Southern Express Company; or interfering with its business or present relations with defendant in any manner whatever, so long as the express company is willing and ready to pay according to all legal rates therefor.

2. That if during the pendency of the suit any dispute should arise between the parties as to what is reasonable compensation for transportation, the complainant may be permitted to bring the matter before the court for its decision.

3. That defendant may be required to transport the express matter, safes and messengers of the Southern Ex-

press Company by the same trains, and with the same accommodation as it may transport its own express matter; that it be required to transport express matter for statutory tolls and compensation as provided by law; that defendant may be required to make a reasonable rebate or reduction from its charges to the Southern Express Company, to be fixed by decree of court, by reason of its performance of accessorial service as specified.

4. That a permanent injunction may issue to the same purport and effect as is prayed in regard to a preliminary injunction.

5. And for general relief.

ANSWER.

The defendant denies generally and specifiically the material allegations of the bill.

Admits the statements made in paragraph twenty (20) of the bill.

Admits the statement made in paragraph 28 of the bill, and that the letter set out therein was sent to and received by defendant at or about the time stated.

Admits the statements contained in paragraphs 31 and 32 of the bill.

Admits the statements contained in paragraph 51, and the giving of the notice set out therein, but denies that said notice was given in pursuance of any combination and agreement between the defendant and the representatives of the railroad companies mentioned in paragraph 39 of the bill.

Admits the statements made in paragraph 45, that the railroad companies have classified freight, and that the rate of toll has been provided by law, but denies that the same cannot be lawfully exceeded by defendant in its charges to complainant or the public; and says that defendant's tariffs

for express rates have not been fixed, and that the rates fixed by law for railroad freights do not embrace express freights or tolls; that no such rates have been fixed by the railroad commissioners.

Defendant avers that under its charter granted on March 3d, 1851, it is authorized to transport passengers, goods, wares and merchandise of all kinds, lumber, produce and other articles usually transported on railroads, and to charge and receive such tolls and freights for transportation as shall be to the interest of the company; and that the directors of the company are authorized to establish such tolls and to alter the same from time to time.

Defendant avers that since the 1st of June, A. D. 1880, it has formed and organized an express department of its road, and has been, and is now receiving and transporting over its lines, and delivering freight commonly known as express freight, as it has a right to do; that the express business is a legitimate business of defendant; that it can serve the public without the intervention of the Southern Express Company, and can serve it as well; and that it is unjust to the stockholders of the company to permit a third party to make use of the property of defendant and the services of its employees, to reap the profit for the transportation of freight which belongs to it.

That other railroad companies have for years past been engaged in transporting express matter over their roads, with as much dispatch and promptness, in as safe and secure a manner, and with as much satisfaction to the public as express companies have been and are doing.

Defendant avers that the compensation it has received from complainant for transportation over its lines during the time of the existence of the contract, was inadequate for the service performed: that the conduct of complainant in the management of its business, its intervention between defendant and its customers, its taking a large amount of freight which was not properly express freight, its contin-

ued violation of its contracts under which it was permitted to do an express business, and its concealment and withholding true and correct reports of the weights of express freights transported over defendant's line of road, occasioned great damage to defendant, and compelled the termination of said contract.

Defendants aver that, as a common carrier, it owes to complainant no other duty than to any other person desiring to transport freight over its road. The defendant does not claim the right to exclude the transportation of express matter of complainant over its road, and has always been willing, and is now willing, to transport any express matter of complainant over said road; but that it claims the right to transport express matter in spaces in its cars selected by itself, and under the supervision, care, and control of its own employees, and denies that complainant has any right to have allotted to itself any particular space in defendants cars, or to permit its messengers to take charge of its express freight.

ARGUMENT AND AUTHORITIES.

It will be perceived that the complainant merely asserts a right which it avers has grown up and it has acquired by usage, and by the acquiesence of defendant; which it has enjoyed for a long time; which has become beneficial to it and to the public; that it is a lawful right; that it consists of the facilities and accommodations it has *heretofore* enjoyed in the conduct of the express business on the lines of defendant's roads; that it is willing to pay a reasonable compensation for those facilities and accommodations; that it is about to be deprived of them by the act of defendant; and that the defendant in that respect be enjoined. It is simply an application for an injunction; no other relief is asked; nor from the nature of the suit could any other relief be granted.

There is no averment of what is a reasonable compensation, nor that defendant has charged or received an unreasonable compensation. It says that the rates of toll and compensation have been provided by law, but does not say what the law provides in this respect; it simply asks the court to lay down a rule of law and to require the defendant to conform to it in its business with the company. It is true it asks in the prayer of the bill, that if during the pendency of this suit any dispute should arise between the parties as to what is reasonable compensation for transportation, the complainant may be permitted to bring the matter before the court for its decision—during the pendency of what suit? Why, of course, the suit to establish these rights, and to specially enjoin the defendant from violating them or by its mandate to order that the facilities asked for should be granted by the defendant to the plaintiff—not a suit to recover damages for the violation of such an order, or mandate, or perpetual injunction—if so, the suit is a continuing one, always pending.

Until the final judgment in this case, during what we call the pendency of the suit, there was no application to the court for a rule to fix the measure of compensation, to determine what in any given case, or in general, was a reasonable compensation.

The preliminary injunction, or first restraining order made by the court, ordered:

"That the defendant, its officers, agents, &c., be enjoined and restrained, until the final determination of this cause, from preventing the plaintiff's enjoying the same facilities in the conduct of its express business, permitted to any other express company, or exercised by the defendant itself, on the payment by the plaintiff of a reasonable compensation therefor."

This was on the first day of June.

Then, on the 6th of November, 1880, a further order was made, modifying the original preliminary order. This

order was substantially the same, as to compensation, as the first; that is, that it should be reasonable, and that defendant should carry for reasonable compensation. (See p. 8 of plaintiff's motion in this case.) There were other matters in it, however; it embraced an order in regard to accessorial services: it enjoined the defendant from making discrimination against plaintiff for return of empty kegs or packages, from charging plaintiff higher rates of freight than are charged against other express companies, and that it exacted for the service of its own department. It made a further order against preventing the transportation of express matter by plaintiff over defendant's road, and from requiring as a prerequisite the listing or disclosing by the plaintiff of the contents of packages presented for transportation, and of preventing the messengers of plaintiff, on the payment of passenger fare, from like accommodations, for the care and custody of plaintiff's shipments, as were accorded to the messengers of other express companies, or those engaged in like service for defendant. So that there never was any application for an order of the court fixing the rate of compensation, nor any rule or decision on the subject, except that it should be reasonable.

Now, taking the pleadings — bill and answer — and the motions and preliminary orders for the purpose of interpreting this case and ascertaining the issues, what is there in it?

The plaintiff in his brief says:

There are two issues of law, raised by the pleadings as originally framed:

(1.) Was it the public duty of the appellant to afford transportation and other needful facilities to the appellee, for the transportation of its express matter and messengers, and the conduct of its business, whereby the private right of the appellee might be subserved?

(2.) If so, what was "a fair and reasonable rate of compensation" to be paid by the appellee for such services by the appellant?

The first issue is fairly stated; but if the attorneys for the appellee mean by what was a fair and reasonable rate of compensation, that the court was asked to fix a given and absolute amount as a fair and reasonable rate of compensation, we say that no such issue was presented by the pleadings.

Nor is it true, as stated by counsel, that "*the prayers of the bill were directed specifically to the solution of the question*" as to what was "a fair and reasonable rate of compensation."

The bill simply avers:

"That the railroad company have classified railway freight according to law; that the rates of toll or compensation have been provided by law, and that the same cannot be lawfully exceeded by defendant in its charges to your orator." (See paragraph 45 of the bill.)

And see also plaintiff's brief, p. 38, in which he states, as the averment of the bill, viz.: "*a rate not in excess of the classified railway freights as provided by law*," &c.

And so the plaintiffs aver and so they pray, that "*a fair and reasonable rate of compensation*" shall be decreed to be a rate not in excess of classified railway freight.

And the court in its decree comes fully up to the averments and prayer of the bill, for it says (see latter part of section 11 of the decree) as follows:

"The said plaintiff paying for the services performed for it by the defendant, monthly, as herein prescribed, at a rate not exceeding fifty per centum, more than its prescribed rates, for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account, or for any other express or other corporation, or for private individuals; reserving to either

party a right at any time hereafter to apply to this court, according to the rules in equity proceedings, for a modification of this decree as to the measure of compensation herein prescribed."

That is to say, the parties are not precluded from bringing another suit to modify this decree, it is like dismissing a bill without prejudice.

It is true, the court did not fix any given amount absolutely, nor was it asked to do so, but it did make a decree upon the issue presented, and that decree was final.

Judge Miller, in his opinion, says:

"8. While I doubt the right of the court to fix in advance the precise rates which the express companies shall pay, and the railroad companies shall accept, I have no doubt of its right to compel the performance of the service by the railroad company, and after it is rendered, to ascertain the reasonable compensation and compel its payment."

The truth is, that this matter of a fixed compensation is an afterthought; *it is not in the case*, and from the very nature of the service, it could not be fixed definitely and finally in advance. The whole of the bill shows that its object was to establish a right, and the right being established, a court of law could at any time after the service is rendered, determine what was a reasonable compensation for the services performed.

Counsel for appellee says, page 40 of his brief:

"If the appellant had been content to permit the court below to carry into effect, by its interlocutory decree, the suggestion of the opinion, there would have been no necessity for this motion."

We suppose that the court made this decree without the permission of the appellant or the appellee, and made it final and not interlocutory, upon the issues presented by the

pleadings, and not upon the great mass of irrelevant testimony with which the plaintiff has thought proper to encumber the record in the case.

Counsel for the appellee lays great stress upon the tenth paragraph of the decree, in which it is recited that inasmuch as it has been alleged by the complainant (where alleged? certainly not in any of the pleadings) that since the termination of the contract establishing the rate of compensation, and the service of the preliminary injunction, the defendant has, in violation of the injunction, made unjust discriminations against complainant, and charged unreasonable rates of compensation; therefore, it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, &c., and for the appointment of a master to take proof and report thereon.

This has nothing to do with the merits of the controversy presented by the pleadings, and is just about so much a part of the case as would be a proceeding for contempt by the issue of an attachment against the defendant.

The question of what is a final decree has been repeatedly passed upon by this court, and whilst this court has several times intimated that it is greatly to be desired that a decree should not only be *final*, but complete, before the case is brought up by appeal, yet we think that the authorities are clear to the effect that a decree such as this is both final and complete.

In Forgay v. Conrad, 6 Howard. p. 201, the court held: "That a decree of the court below, that certain deeds should be set aside as fraudulent and void; that certain lands and slaves should be delivered up to complainant; that one of defendants should pay a certain sum to complainant; that complainant should have execution; that a master should take an account of the profits of lands and slaves, and also an account of certain money and notes, and then concluding as follows, to wit: And so much of said bill as contains or relates to matters hereby referred to the master for a report

is retained for further decree in the premises; and so much of said bill as is not now, nor has been heretofore adjudged and decreed upon, and which is not above retained for purposes aforesaid, be dismissed without prejudice, and that said defendants do pay the costs"—was a final decree from which an appeal would lie.

This was on motion to dismiss the appeal because it was not final. Motion overruled.

In Barnard v. Gibson, 7 Howard, 657, the decree was held not to be final as there was no decree for costs.

In Whiting v. Bank of the United States, 13 Peters, 15, Judge Story, in holding that a decree of foreclosure of a mortgage and sale is to be considered in equity a final decree, before there has been any decretal order confirming the sale, says: "The original decree of foreclosure and sale was final upon the merits of the controversy," and that the "defendants had the right to appeal from that decree as final upon the merits as soon as it was pronounced"—referring to and approving the case of Ray v. Law, 3 Cranch, 179.

In the case of Thomson v. Dean, 7 Wall., 342, the Chief Justice delivering the opinion, says: "We think that the current of decisions fully sustains the rule laid down by the late Chief Justice in Forgay v. Conrad,"—quoting from the language of the court in that case. The reasoning, he says fully vindicates this rule as a sound construction of the acts of Congress relating to appeals.

The opinion expresses the desire that appeals be taken only from decrees which are not only final, but complete.

"And it may be true (says the court) that under the influence of these considerations, the degree of finality essential to the right of appeal has been sometimes pushed quite to the limit of construction.

"In this case the decree determined the right to the property," and, as the court says, "determined the principal matter in controversy between the parties, and since this

could not be changed, except by a new and distinct proceeding, it determined that matter finally."

The decree provided for an account to "be taken, and stated as to the amount paid and to be paid for the stock, and as to dividends accrued, and to be credited under contracts between the parties."

French v. Shoemaker, 12 Wallace, p. 86, was an appeal taken from a decree of the Circuit Court for the District of Virginia, rendered by Chase, Ch. J.

The decree of the Circuit Court was as follows:

"This cause coming on to be heard upon bill and answer * * * and upon the proofs, and upon being maturely considered, the court is of opinion that the equity of the *case is with the complainant in the original bill;* and, thereupon, do order, adjudge, and decree that James S. French, the defendant in the original bill, be perpetually enjoined and restrained from any use of the name or title of the president of the Washington and Alexandria Railroad Company, under any election to that office heretofore held, and from any action by himself or any attorney or agent to interfere with any proceedings for the reorganization of said company, under the contracts mentioned in said bill, dated the 6th of December, 1867, and from any proceeding whatever, not in accordance with said contracts, without prejudice, however, to the right of the said French to the stock assigned to him by the said contract, or to assess any claim he may have against said company reorganized under said contract, or against the said Shoemaker, or against the Adams Express Company, not in contravention of said contract, or to pursue, by proper proceeding in law or equity, any claim he may have in respect to the distribution of stock made in and by said contract, founded upon failure of consideration or other cause.

"*It is further ordered, adjudged, and decreed that the said defendant French pay the costs in this cause; and leave is given to either party to apply at the foot of the decree for such further order as may be necessary to its due execution, or as may be required in relation to any matter not finally determined by it.*"

This was held to be a final decree. Justice Strong, in delivering the opinion of this court in the case of Stowall v. Banks, 10 Wall. p. 586, says: "It cannot be maintained that a decree which adjudges a certain sum of money to be due from a defendant to the complainant, and awards execution to collect it, is not a final decree conclusive upon the parties. We do not (*say the court*), overlook the fact that in this instance the court, after having determined the sum due to each of the complainants and directed its payment, and after having awarded execution, went on to direct that the administrator be allowed as payment to the respective parties, to be deducted from the amounts therein adjudged to them, the principal and interest of any note held by him against either of them. It also directed that the several shares of the parties to whom the estate was awarded, should be subjected to rateable deduction for fees yet unpaid for collection of notes belonging to the administrator. *But we think the decree was not for this reason the less final.*

And further: "It is not unusual in courts of equity to enter decrees, determining the rights of the parties, and the extent of the liability of one party to the other, giving, at the same time, a right to apply to the court for modifications and directions. It has never been doubted that such decrees are final; they give the successful party the full benefit of the judgment."

The case of Railroad Company v. Swasey, 23 Wall., p. 405, relied upon by appellee, does not vary the principles by this court in the cases above cited.

In this case the amount of the debt due was not ascertained; there was no order of sale; the amount of the debt and the proportion of stock applicable to its payment was still open for future adjudication; the court only held in that case that the plaintiff had a lien upon an equitable proportion of the stock, and that the lien may be enforced by sale if payment of the debt is not made; and yet the

amount of the debt is not ascertained, and the decree winds up by saying "*and this cause is held for further directions.*"

Of course this was no final decree in any sense of the term, and the court so held.

In Green v. Fish, 103 U. S., p. 518, the court found that Mrs. Fish was the owner of one-half of the property, real estate, but it was not divided, nor was it ascertained whether it could be divided. She had averred that a partition sale was necessary; that a division could not be made in kind; but there was no finding by the court upon these averments in the petition, and the court referred the matter to a master to "*proceed to* make partition according to law under the direction of the court." Held not to be a final decree.

In the case of Henry Bostwick, Receiver of National Bank of Fishkill, and others v. Theodore Brinkerhoff, error to the Court of Appeals of New York, and decided at the present term of this court, the Chief Justice delivering the opinion of the court, says:

"The rule is well settled and of long standing, that a judgment or decree to be final, within the meaning of that term, as used in the Acts of Congress, giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered."

Referring to the cases of

Whiting v. Bank of U. S., 13 Peters, 15;
Forgay v. Conrad, 6 Howard, 204;
Bronson v. Railroad, 2 Black, 531;
Thompson v. Dean, 7 Wallace, 345,

and other decisions of this court upon the question of what is a final decree. If the decrees of the court in the cases

last referred to did "*terminate the litigation between the parties on the merits of the case*," to use the language of the chief justice quoted above, then most assuredly the decree in the case now before the court, terminated the litigation between the parties on the merits of the case.

The rights, and facilities and accommodations claimed by the plaintiff, were accorded to it by the decree, that is to say, the court decreed that plaintiff should be permitted to do an express business on defendant's road in the manner, and with the accommodations and facilities claimed by plaintiff as belonging to that business, for a reasonable compensation, not to exceed a certain amount, and that was what was asked, and all that was asked, by the plaintiff, and in this respect the injunction was made perpetual.

The remedy asked in the bill was a preventive one; that is, first, to declare the rights of the plaintiff to be as claimed, and then by injunction to prevent the violation of the right.

The last averment in the bill is that a court of equity has the power to compel defendant to keep within the limits prescribed by law, and to proceed, by injunction, to prevent illegal injury or destruction to the rights of property of others.

Judge Miller, in delivering his opinion, doubts the right of the court to fix in advance the precise rates which the express companies shall pay, and the railroad companies shall accept; and the decree following the opinion, does not attempt to fix precise rates; nor do the proceedings of the court had subsequent to the decree, in which a master is appointed, contemplate the fixing of precise rates as a rule; on the contrary, they refer only to the alleged violation of a modified order of injunction made after the commencement of the suit, and which order was, by its terms, to continue in force only during the pendency of the suit.

Judge Miller, in his opinion, further says:

"I have no doubt of the right of the court to compel the performance of the service by the railroad company, and after it is rendered, to ascertain the reasonable compensation and compel its payment."

If, then, the business of the two companies is to continue indefinitely, and the plaintiff has an indefinite right to complain that the compensation charged is unreasonable, and the court must ascertain what is reasonable upon every complaint, and compel its payment by decree in each case of complaint, there never could be a final decree, and the judgment of the Circuit Court would become supreme over the rights of the parties.

The impossibility of fixing in advance precise rates of compensation, must be apparent to any one from the very nature of the business itself, when it is considered how many things affect the cost of transportation to the railroad company.

The reference to the Master in this case, was in regard to a mere collateral matter growing out of the suit, and did not in any way affect the merits of the controversy between the parties as presented by the pleadings.

In Bronson v. The Railroad Co., 2 Black. 529, Mr. Justice Davis, in overruling the motion to dismiss the appeal, on the ground that the decree was not final, said: "The object of the suit was to ascertain how much money was due on the security of the mortgage, and to sell the property unless the amount was paid. The court did find what was due and ordered a sale

"The very purpose of the litigation which was initiated by Bronson & Souter was accomplished, and nothing remained for them to do, if they felt aggrieved by the finding of the court, but to appeal. Their right of appeal attached on the rendition of the decree. * * * It is said that some exceptions to the report of the Master were pending and undetermined when this decree was made, but those exceptions did not relate to any claims of Bronson and Souter: they

were collateral to the main purpose of the suit, and concerned the defendant alone. * * * This decree is not final in the strict technical sense of the word, for something yet remains for the court below to do. But as was said by Ch. Justice Taney, in Forgay *et al.* v. Conrad (6 Howard, 203): 'This court has not, therefore, understood the words, *final decree*, in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the Legislature.' "

The above case is important only as recognizing to its full extent the rule laid down in the case of Forgay v. Conrad.

Inasmuch as that case seems to have been treated as a leading case upon this question, it may not be amiss to quote further from the opinion of Chief Justice Taney:

After citing Whiting v. Bank of U. S., 13 Peters, 15 and Michaud v. Girod, 4 How 503, says at p. 204: "The case before us is a stronger one for an appeal than the case last mentioned. For here the decree not only decides the title to the property in dispute, and annuls the deeds under which the defendants claim, but also directs the property in dispute to be deliverd to the complainant, and awards execution. And according to the last paragraph in the decree, the bill is retained merely for the purpose of adjusting the accounts referred to the master. In all other respects, the whole of the matters brought into controversy by the bill are finally disposed of as to all of the defendants, and the bill as to them is no longer pending before the court, and the decree which it passed could not have been afterwards reconsidered or modified in relation to the matters decided, except upon a petition for a rehearing, within the time prescribed by the rules of this court regulating proceedings in equity in the Circuit Courts. * * * And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a cer-

tain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessarry for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed."

In Mills v. Hoag, 7 Paige 18, application was made to dismiss an appeal from a decree of the vice chancellor. Chancellor Walworth at p. 19, says: "The decree was final, and not interlocutory, as it finally disposed of the subject of litigation so far as the court was concerned. Chief Justice Savage defines a final decree to be the last decree which is necessary to be entered to give to the parties the full and entire benefit of the judgment of the court. The decree in this case comes within that definition, as no further questions or directions are reserved for the future judgment of the court. And although some further proceedings are to be had before a master to carry into effect the decree, all the consequential directions depending upon the result of those proceedings are given in the present decree. It is true there may be exceptions to the master's report, and in that case a further order of the court will be necessary to dispose of those exceptions. But a decree is not the less final in its nature because some future orders of the court may possibly become necessary to carry such final decree into effect. The usual decree in mortage cases, for the sale of the property and the distribution of the fund among the paties and finally disposing of the question of costs, is a final decree as between the complainant and the defendants, and is constantly enrolled as such; although the master's report of the sale and distribution may be excepted to if it is erroneous, and it may require a subsequent order of the court to dispose of the questions which may thus arise."

(*b.*) Counsel for appellee claim that the decree in this case finds its parallel in decrees in patent cases, and that

such decrees under the authorities cited, are not final until the master's report comes in and is confirmed by the court, although the confirmatory decree adds nothing to the interlocutory decree, except that it adjudges the amount of damages and awards execution.

It is a sufficient answer to this argument to say, that in patent cases, the plaintiff claims damages for the infringement of the patent during the period in which the patent has been infringed prior to the commencement of the suit, as well as an injunction against further infringement, so that the granting of the injunction does not dispose of the whole merits of the controversy; but there is no such case made here by the pleadings, and the final judgment must always have reference to the merits of the controversy between the parties.

This is simply an application for an injunction, after having established a right, and at most the fixing of a maximum rate of compensation for the facilities granted—these were the matters in controversy—and the court has definitely and finally passed upon them, so that they could not be brought up again, except by the institution of new proceedings.

(c.) At page 56 of his brief, the counsel for appellee raises this difficulty, viz:

That if the decree appealed from be a final one, and this court four years from now affirms it, and sends its mandate to the court below, and the Master has then read his report, and exceptions have within one month been filed by the parties, and the court below has passed upon them, then both parties would be remediless, because a subsequent appeal (Supervisors v. Kennicott, 94 U. S. 499), "brings up for consideration only the proceedings of the Circuit Court, after the mandate of the Supreme Court has issued." But the gentleman has evidently misread the opinion of the court in the case of Supervisors v. Kennicott; for the court simply decided in that case that whatever has been decided here upon

one appeal, cannot be re-examined in a subsequent appeal of the same suit—that is, that the court would not open the case for further hearing upon the issues already presented and decided. The court in this case did not hold that they would refuse to pass upon questions not presented on the first appeal, because they were raised between the parties before the mandate issued on the first appeal, but merely that they would not re-open questions once decided.

If in the case before the court, the report of the Master under the order of June 5th, 1882, should be excepted to, it would be in regard to matters that were not embraced and could not be embraced in the final decree of March 25th, 1882. All that the Master could report would be what in his opinion would be a fair compensation for services already performed, and whether the defendant had made and collected charges in excess of such rate of compensation, and how much the excess was, and state an account between the parties as to those matters, and nothing of the kind is embraced in the decree appealed from.

We deem it not inappropriate to call the attention of the court to the very great importance of the questions involved in this appeal, and the necessity of having a speedy determination of them by the highest court in the land. Some of the questions are comparatively new, and they arise between two classes of transportation companies, engaged very largely in the transportation of persons and property over a vast extent of territory, and in regard to which the public must necessarily have a deep interest, so far as the rights of those companies are concerned, and the obligations which they owe to each other and to the public. They have been settled adversely to the railroad company by the decree in this case, and we claim a right on the part of the appellant to be heard by the court of last resort upon the questions determined by that decree.

JAMES O. BROADHEAD,
For Appellant.

No. 879-914-994

OFFICE SUPREME COURT U. S.
FILED
JAN 3 1883

Supreme Court of the United States.

OCTOBER TERM, 1882. Nos. 879, 914 and 994.

THE MEMPHIS AND LITTLE ROCK R. R. CO.,
Appellant,

vs.

THE SOUTHERN EXPRESS CO.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. R. CO.,
Appellant,

vs.

THE SOUTHERN EXPRESS CO.

THE MISSOURI, KANSAS AND TEXAS R. R. CO.,
Appellant,

vs.

WM. B. DINSMORE, AS PRESIDENT, &C.

MOTIONS TO DISMISS.

BRIEF FOR APPELLANTS.

DILLON & SWAYNE.

BURROUGHS, Law Case Printer, (Law Telephone 867), 57, 59 & 61 Park Street, N. Y.

In the Supreme Court of the United States.

[No. 914.]

SOUTHERN EXPRESS CO.,
Appellee,

vs.

ST. LOUIS IRON MOUNTAIN AND SOUTHERN RAILROAD COMPANY,
Appellant.

MOTION TO DISMISS APPEAL.

BRIEF FOR APPELLANT.

I. For an analysis of the bill and answer we refer the brief of our associate counsel, Messrs. Broadhead and Hauessler. It is unnecessary for us to go over the same ground, and we shall add but little in the way of argument to what they have so well said. It may be well, however, to add a few remarks.

The point before the Court is, shall the appeal be dismissed?

The solution of that question depends upon the elements and character of the decree.

The Act of Congress upon the subject declares that "an appeal shall be allowed to the Supreme

"Court from all *final decrees* of any Circuit Court,
"or of any District Court sitting as a Circuit Court,
"in cases of equity and of admiralty and maritime
"jurisdiction, where the matter in dispute exceeds
"the sum or value of two thousand dollars, and the
"Supreme Court is required to hear and determine
"such appeals."
Rev. Stat. U. S., Vol. 1, Sec. 192.

There is no question that the matter here in dispute largely exceeds "the sum or value of two thousand dollars."

II. The Decree.

We deem it best to give the decree in full. Those parts to which we desire particularly to call the attention of the Court—being those most material to be considered—are specially numbered, and the numerals are in brackets.

"It is by the Court ordered, adjudged and decreed as follows:

"I. That the express business, as fully described and shown in the record, is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized so as to require the Court to take notice of the same as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads.

"II. That it has become the law and usage, and is one of the necessities of the express business, that the property confided to an express company for transportation should be kept, while in transit, in the immediate charge of the messenger or agent of such express company.

"III. That to refuse permission to such messengers or agents to accompany such property on the steamboats or railroads on which it is to be carried, and to deny to them the right to the custody of the property while so carried, would be destructive of the express business, and of the rights which the public have to the use of such steamboats and rail-

roads for the transportation of such property so under the control of such messengers or agents.

"IV. That the defendant, its officers, agents and servants have no right to open or inspect any of the packages or express matter which may be offered to it for transportation by the plaintiff's company, or to demand a knowledge of the contents thereof, nor to refuse transportation thereof, unless such inspection be granted or such knowledge be afforded.

"V. That it is the duty of the defendant to carry the express matter of the plaintiff's company, and the messengers or agents in charge thereof, at a just and reasonable rate of compensation, and that such rate of compensation is to be found and established as a unit, and is to include as well the transportation of such messengers or agents as of the express matter in their custody and under their control.

"VI. That on and subsequent to the first day of April, 1878, the said defendant afforded to the said plaintiff all the facilities needed by it for the conduct of its express business over the defendant's lines, and such as were specifically provided for in the contracts in the bill herein set forth; that thereafter the defendant notified the plaintiff that such facilities would be withdrawn; and that it was the intention and purpose of the defendant to exclude the plaintiff's company from its lines on and after the 25th day of May, 1880; that such intention and purpose were restrained by the preliminary injunction order of the Court, which said injunction order was afterwards modified as appears in the record.

"VII. That it is the duty of the defendant to afford to the plaintiff all express facilities, and to the same extent and upon the same trains that said defendant may accord to itself; or to any other company or corporation engaged in the conduct of an express business on the defendant's lines, and to afford the same facilities to plaintiff on all its passenger trains.

(**No. 1**) "VIII. *That the plaintiff keep and render monthly, a true account of the services performed for it by defendant, and pay therefore at the rate hereinafter specified*, on or before the 15th of each month after the date hereof for the business of the month preceding, and that the defendant has no right to require prepayment for said express facilities or payment therefor at the end of every train, or in any other manner than as is herein provided; and that plaintiff execute and deliver to the defendant a bond

in the sum of one hundred and fifty thousand dollars ($150,000), conditioned well and faithfully to make such payments as are herein provided, *and with surety to be approved by a Judge of the Court.*

"IX. That it is and was the duty of the said defendant to afford and to have afforded such facilities to the plaintiff as herein specified for a just and reasonable compensation.

(**No. 2**) "X. Whereas it is alleged by complainant that since the commencement of this suit and the service of the preliminary order of injunction herein, the defendant has, in violation of said injunction and of the rights of complainant, made unjust discriminations against complainant, and has charged complainant unjust and unreasonable rates for carrying express matter; therefore it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, and for such order with respect thereto as the facts, when ascertained, may justify, and for the appointment of a master to take proof and report thereon.

(**No. 3**) "XI. That the defendant, its officers, agents, servants and employees, and all persons acting under their authority, be, and they hereby are, permanently and perpetually enjoined and restrained from interfering with or disturbing in any manner, the enjoyment by the plaintiff of the facilities provided for in this decree to be accorded to it by the said defendant upon its lines of railway, or such as have been heretofore accorded to it for the transaction of the business of the plaintiff, and of the express business of the public confided to its care, and from interfering with any of the express matter or messengers of the plaintiff, and from excluding or ejecting any of its express matter or messengers from the depots, trains, cars or lines of the said defendant as the same are by this decree directed to be permitted to be enjoyed and occupied by the said plaintiff, and from refusing to receive and transport in like manner as the said defendant is now transporting, or as it may hereafter transport, for itself or for any other express company over its lines of railway, the express matter and messengers of the said plaintiff, and from interfering with or disturbing the business of the said plaintiff in any way or manner whatsoever; the said plaintiff paying for the services performed for it by the defendant monthly as herein prescribed, at a

rate not exceeding fifty per centum more than its prescribed rates for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account, or for any other express or other corporation, or for private individuals, reserving to either party the right at any time hereafter to apply to this Court, according to the rules in equity proceedings, for a modification of this decree as to the measure of compensation herein prescribed.

(**No. 4**) "It is further ordered, adjudged and decreed that the defendant pay the costs to be taxed herein, and that an execution or a fee bill issue therefor."

III. Remarks and authorities.

("No. 1.") *Section VIII of the decree.*

This clause, it will be observed, takes the business of the appellant wholly out of its hands. Its rights are disregarded. The proceeding is entirely one-sided. The account is to be kept by the *debtor*—not by the *creditor*. The bond for *future payment* is to be given by the debtor and approved by a judge. The creditor is to be bound as to both, and there is no provision that he shall be heard as to either.

But the most material point is that the decree in this respect is as "*final*" (to use the term employed in the statute) as language can make it. There is no limitation in point of time—nor any other condition or qualification whatsoever.

("No. 2.") *Section X of the decree.*

The previous recitals decide all the legal points involved in the case, *finally* and conclusively in favor of the appellee;

The appellee is to be the moving party. The appellant can neither move nor compel the appellee to move.

The appellee may choose never to move, and if so, according to the contention of the other side, the Railroad Company could never appeal.

But there are other answers which we think conclusive:

(1) The recitals show that the whole law of the case had been decided in favor of the Express Company.

(2) The matter thus provided for was merely collateral and incidental to the vital points so decided.

(3) If the decision of the Court below should be reversed, the inquiry provided for could not and would not be made. If made before the reversal, its results in that event, even if favorable to the appellee, would be an utter nullity.

Then why incur the expense and delay involved in making it until the fundamental question of the right to make it is decided by the Appellate Court?

(4) If the judgment of the Appellate Court in this case should be adverse to the apellant, and the enquiry should be thereafter made—whatever the result—either party would have the right to appeal. This is settled in Blossom vs. the Railroad Co., 1 Wall., 655. That case was an appeal by a purchaser under a decree in equity. See also Supervisors vs. Kennicut, 94 U. S. R., 498; Hickley vs. Gilman, Id., 467; *Ex parte* Jordan, Id., 248; Mills vs. Hoage, 7 Paige, 17.

As well might it have been contended in the case first cited that the original decree could not be appealed from until the sale had been made and confirmed or set aside, as to insist here upon what is contended for by the appellee.

The rule is that nothing settled by the Appellate

Court can be gainsaid, but that anything done subsequently by the Court below—outside of that scope—and not being merely ministerial or matter of detail or discretion, may be made the subject of review by another appeal.

(See Blossom vs. Railroad, *supra*).

Justice and reason require this.

The second appeal may be as important to the party appealing as the first one was to the party appealing in that case.

("No. 3.") Section 11 of the decree.

It declares: "That the defendant, its officers, agents, servants and employees and all persons acting under their authority, be and they hereby are *permanently and perpetually* enjoined and restrained from interfering with or disturbing in any manner," &c.

The qualification reserves "to either party the right at any time hereafter to apply to this Court" * * * "for a modification *as to the measure of compensation herein prescribed.*"

The whole law of the case having been already decided in favor of the Express Company, here, "permanently and perpetually" by injunction, all that the Express Company sought by its bill is *finally* and expressly given to it.

The right to apply for a modification is carefully limited to "the measure of compensation."

Does this affect the *finality* of the decree? *Non constat* that either party will ever so apply. Can it be that the *finality* depends upon the volition of the parties, and notupon the act of the Court, and that the decree is final if such application be not made, and not final if it be made?

But the answer upon which we rely is, the propo-

sition upon which we have all along insisted; that the decree settles *finally* the entire rights of the parties, and disposes *finally* of the entire merits of the case, and that this matter is immaterial to that view of the subject.

("No. 4.") It is declared at the foot of the decree, that the appellant shall pay the costs, "and that an execution or fee bill shall issue therefor."

We think it is difficult to imagine how a decree can be *more final* than this one.

If the appeal be dismissed, the appellant will, of course, proceed at once to collect the costs. That being done, we do not see that anything remains for him to do but to sit down quietly and enjoy "permanently and perpetually" the fruits of his victory.

The Court will readily perceive the motive of one party to have a hearing here as early as may be, and of the other to postpone it as long as possible.

The first adjudication of this Court as to what is *a final decree* was made in Ray vs. Law, 3 Cr., 179. Chief Justice Marshall speaking for the Court, there said: "This Court is of the opinion that a decree for a sale under a mortgage is a final decree and may be appealed from.

Such has been the doctrine of this Court ever since.

Forgay vs. Conrad, 6 How., 204, is particularly deserving of attention. The opinion was delivered by Chief Justice Taney. It was evidently prepared with the greatest care and consideration. We hazard nothing in saying that it is the most authoritative adjudication of this Court upon the subject. It has not been impugned by any later judgment. Its parallelism to the present case as regards the point un-

der consideration is so exact and complete that we think that this appeal can not be dismissed without overruling directly that authority.

That case was a creditor's bill. The complainant was the assignee of a bankrupt. The Court found that certain transfers of lands and slaves were fraudulent and void, and decreed that all the property should be delivered up to the assignee. The opinion says: "The decree then directs that the master take an account of the profits of the land and slaves ordered to be delivered up, from the time of the filing of the bill until the property was delivered, or to the date of the master's report," * * * * and concludes in the following words: "and so much of said bill as contains or relates to the matters hereby referred to a master for a report, *is retained for further decree in the premises*," * * * "*and that the said defendants do pay the costs.*" It is said further in the opinion (p. 204) "and according to the last paragraph in the decree, *the bill is retained merely for the purposes of adjusting the accounts referred to the master.*"

It will be observed the present case is a stronger one for an appeal than that one. In ours there is no *requirement* that either party shall do anything, and there is no certainty that either will ever avail himself of the license given by the decree.

On the same page the Chief Justice says, further: "When the decree decides the right to the property in contest, directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried *immediately* into execution, the decree must be regarded a *a final one* to

that extent, *"although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed."*

In our case the decree executed itself *eo instanti* that it was made "permanently and perpetually" by an injunction, and required furthermore that execution should issue for the costs.

We think we have shown the parallelism upon which we insist.

In Thompson vs. Dean, 7 Wall., 346, Chief Justice Chase, speaking for the Court, said: "We think the current of authority fully sustains the rule laid down by the late Chief Justice, in the case of Forgay vs. Conrad, which we again declare in his own language." He then quotes the rule from that case as we have quoted it, *supra.*

"Unquestionably the whole law of the case was settled by the Chief Justice on that decree—and as nothing remains *to be done unless a new application shall be made at the foot of the decree, the Court is of opinion that the decree is a final* one, as it has conclusively settled all the legal rights of *the parties involved in the proceedings.*"

(Opinion of the Court by Mr. Justice Clifford)—French vs. Shoemaker, 12 Wall., 98.

This applies with full force to the case in hand.

"It is not unusual in courts of Equity to enter decrees determining the rights of the parties and the extent of the liability of one party to the other, giving at the same time the right to apply to the Court for modifications and directions. *It has never been doubted that such decrees are final.*"

Stoval vs. Banks, 10 Wall., 587.

"A decree with such a liberty reserved is still a final decree, and when signed and enrolled, may be pleaded in bar to another suit for the same matter."

2 Daniells Ch'y. Prac., 641, 642.

"A decree is not the less final in its nature because some future orders of the Court *may possibly* become necessary to carry such decree into effect."
Mills vs. Hoag, 7 Paige, 19.

The argument of the other side, pushed to its consequences, would maintain the proposition that if one be condemned to the gallows or the penitentiary, there can be no hearing upon error until the sentence is executed.

A delay of justice is to that extent a denial of justice. In many instances there is a large expenditure of both time and money which the final result shows to have been thrown away. We refer particularly to a certain class of patent right cases. The rule of appealability should be construed in the light of these considerations. We think this is the wisest policy and would best subserve the ends of justice.

DILLON & SWAYNE,
Of Counsel for the Appellant.

NOTE.

We are of counsel for the appellants in cases No. 994 and 879, in each of which there is also a motion to dismiss the appeal. This brief is intended for those cases as well as for the one named in it.

D. & S.

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CLERK

Supreme Court of the United States.

No. 994.

WILLIAM B. DINSMORE, AS PRESIDENT OF THE ADAMS EXPRESS COMPANY, AND A SHAREHOLDER THEREIN, APPELLEE,

vs.

THE MISSOURI, KANSAS AND TEXAS RAILROAD COMPANY, APPELLANT.

Motion to dismiss appeal or for certiorari.

ARGUMENT OF WILLIAMS & DILLON.

A. T. BRITTON,
J. H. McGOWAN,
WILLIAMS & DILLON.
Of Counsel for Appellant.

THOS. J. PORTIS,
Solicitor for Appellant.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS.
1883.

Supreme Court of the United States.

WILLIAM B. DINSMORE, as President of the Adams Express Company, and a shareholder therein, Appellee,

vs.

THE MISSOURI, KANSAS and TEXAS RAILROAD COMPANY, Appellant.

No. 994.

Motion to Dismiss Appeal, or for Certiorari.

This is a motion to dismiss the appeal in this case because the decree appealed from is not final, or for *certiorari* to send to this court testimony alleged to have been taken in the case. The facts in the case have been so fully stated by my associates in their brief that we shall only allude to them so far as is necessary to make our argument understood The bill in this case was filed on the 28th of December, 1880. A temporary restraining order was granted at that time. On the 15th of March, 1881, the defendant filed its answer, and on the same day the complainant filed his replication. On the 15th of April, 1881, the complainant filed a supplemental bill, and on the 16th of May, 1881, the defendant filed a general demurrer to both the original and supplemental bills. On the 21st of October, 1881, the complainant notified the defendant that he would take testimony on the 26th of October, 1881, and under this notice testimony was

in fact taken, and has not been included in the transcript in this case.

In considering the matters contained in the motion, it will be most convenient to refer first to the motion for *certiorari*. The appellee urges, first, that the certificate of the clerk appended to the transcript is insufficient under the equity rules of this court; and, second, that if the certificate is sufficient it is untrue in point of fact, inasmuch as the transcript does not contain the evidence. The sufficiency of the certificate in form has been fully argued and sustained by a brief filed in this case by Messrs. Britton & McGowan, and need not be referred to by us. Inasmuch as the only objection made to the transcript or the certificate thereto appended is the omission to include the testimony taken in the case, if it can be shown that the testimony ought not to have been included, of course this court would not order it sent up, even if the clerk's certificate is in point of form defective. To determine this question requires a brief examination of the circumstances under which the testimony was taken. The appellee claims a "vested right" in the testimony taken in this case, urging that it was properly taken, because the defendant, having once filed an answer, had no right to withdraw the same and substitute a demurrer without special leave of the court first had and obtained; and, second, that he was at liberty to ignore the demurrer entirely, because it had no certificate and affidavit attached thereto, as required by rule 31.

It will be seen by the record that the replication having been filed on the 15th of March, 1881, the cause was at issue, and would have stood for trial at the ensuing June term of court. The appellee, desiring the continuance of the case, and intending to force one, holding as meantime by his restraining order, filed what he called a supplemental bill on the 15th of April, 1881. If this was a sup-

plemental bill it was as necessary for the defendant, under Rule 57, to plead answer or demurrer thereto as it was to the original bill, and such pleading would of necessity continue the cause over the ensuing June term of court. Under the circumstances, and desiring to expedite rather than retard the cause, and after consultation with Messrs. Blair & Perry, solicitors of record for the appellee in the case, the answer was withdrawn and the general demurrer filed to both the original and supplemental bills. At the June term of court the demurrer was called up by both parties, but Judge McCrary declined to hear the same in the absence of Mr. Justice Miller. Thereupon all parties united in a despatch to Mr. Justice Miller, then holding court at Denver, asking him to hear the demurrer in Denver or elsewhere. Subsequently, by stipulation between the parties thereto, (transcript, p. 102,) the cause was brought on for argument before the circuit judges at St. Louis.

In view of these facts, the assertion that the answer was not properly withdrawn by leave of court and the demurrer substituted therefor, comes with ill grace from counsel for appellee, and the objection that the demurrer did not have attached thereto the necessary certificate and affidavit is unworthy of so important a cause as this. The rule requiring the certificate and affidavit is purely arbitrary, and was intended to reach cases where a suspicion might arise that parties were trifling with the courts for the sole purpose of delay; but when it is manifest from the record itself that no certificate is necessary, none should be required. In this case the record shows that the only party who desired and made delay was the appellee. Consequently, an affidavit on our part that we did not interpose the demurrer for delay was unnecessary. The certificate that the demurrer was well founded, in the opinion of counsel, was still more unnecessary, in view of the fact that we stood upon the de-

murrer and allowed final decree to go upon the bill when it was overruled. If, however, the certificate was still necessary, the complainant was not at liberty to ignore the demurrer for lack of such certificate, but should have proceeded by proper motion to either strike the demurrer from the files or compel us to attach the certificate thereto. Not having done this, and having interposed no objection when the case was called for hearing in June at Leavenworth, and when it was actually heard subsequently at St. Louis, it is now too late to urge the objection for the first time in this court. If, then, we are correct in assuming that a demurrer was on file undisposed of in the case, it was not at issue so as to authorize the taking of testimony in the case, and of course, if improperly taken, the testimony ought not to be included in the transcript here; and if it is conceded that we had no right to withdraw the answer without the formal leave of the court entered of record, it still remains that we were compelled to plead, in some form, to the supplemental bill, and our general demurrer would still be a demurrer to the supplemental bill in any event, and so long as that demurrer remained undisposed of there were still no joinders of issues upon which testimony could be taken under the equity practice of this court.

There is another reason why this testimony does not properly belong in the transcript, even if we concede for the sake of the argument that there was no authority whatever to file the demurrer or withdraw the answer. The replication having been filed on the 15th of March, 1881, the cause then would have stood at issue, and, under rule 69, but three months thereafter could have been allowed for the taking of testimony without an order of the court enlarging the time, upon special cause shown. No order enlarging the time for taking testimony was made in this case, and no cause was shown why any should be made. And inasmuch as the rule

provides that no testimony taken after such period shall be allowed to be read in evidence at the hearing, we claim that the testimony claimed to have been taken in this cause is no part of the record here. It may be claimed that the *ex parte* order of the district judge, in September, 1881, appointing a special examiner with all the powers conferred upon such officer by the 67th equity rule, was an enlargement of the time of taking testimony; but such a claim cannot be sustained. The rule requires an actual order enlarging the time *for special cause shown*, and nothing of that kind took place in the application and order referred to. The judge, without any knowledge as to whether the time for taking testimony had elapsed or not, merely designated a proper officer to act as examiner in the case, provided there was anything which an examiner might rightfully do. It was merely the appointment of an examiner by the court, and not an order enlarging the time to take testimony.

If it should be held, however, that the cause was properly at issue and the testimony was properly taken, it does not follow that the appellee has any "vested right" in such testimony, nor that the same should be certified to this court, unless it is apparent that the failure to so certify in some way prejudiced the rights of the appellee. The testimony could only be use dto support the allegations of the bill; and inasmuch as we, by our demurrer, admit the bill to be true in every particular, no testimony could possibly strengthen the case made by the appellee in his own pleadings. He stands in a better situation than he possibly could with the evidence. He could not prove more than he avers. It rarely happens that a party can prove as much. By our action, however, we saved him the trouble of proving anything, by admitting all that he alleged, claiming, then, as we shall at the final hearing of this case, that upon the case made by his own showing he is entitled to no relief. What possi-

ble claim can he have upon this testimony? He cannot urge that it would show him entitled to other and different or greater relief than is granted him by the present decree, because he is not the appellant, and makes no complaint of the decree. There is only one case in which a party under any circumstances might demand the testimony in the case, and that would be testimony taken in aid of a bill of discovery. This is not a bill of discovery in any sense of the word. In such a bill it is absolutely necessary to aver that the matters about which a discovery is sought are peculiarly within the knowledge of the adverse party, and can be proved by no one else. (Brown against Swann, 10 Peters, 497.) And even in a case of that kind, if the court can proceed to render a decree satisfactory to the complainant without such testimony, it does not lie in the mouth of the complainant to complain that the testimony taken was not included in the record, he not being the appealing party. It may be remarked here that all the way through the argument in this case the complainant acts as though he were complaining of errors alleged to have been committed by the court below in the progress of this case.

As conclusive, however, of the question that the testimony is not necessary here, and as curing all irregularities in regard to the withdrawal of the answer and the substitution of the demurrer, is the order of the court made on the 8th day of June, 1882, (transcript, page 110,) allowing the defendant to withdraw its answer and substitute its demurrer. By doing this the court, of course, based its decree solely upon the bill of the complainant, and not upon any evidence taken in the case. If it found the bill sufficient in its allegations to warrant the decree from which we appeal, it is not for the complainant to urge here that there was error in the action of the court, or that he had any "vested rights" in the testimony taken in the case which the court by its action disregarded. If he feels himself aggrieved by such

action he should have followed the course pursued by the defendant and taken his appeal.

It is urged by appellee, notwithstanding the fact that the decree says in terms that it is based upon the bill, that it is really founded upon evidence in the case. That it is not founded upon evidence in the case, that the case was never heard other than upon the demurrer, will, we think, become apparent to the court when it examines the record printed for use in this argument, and we certainly hazard nothing in saying that in the argument before Judge Miller no testimony taken in this case was read or considered by him, and that his conclusions, which were afterwards embodied in the decree appealed from, were reached solely by an examination of the bill; and that it was the intention of counsel for the complainant to present this case upon the demurrer in Saint Louis is also evident from the language of the stipulation, (transcript, page 102,) prepared by him and signed by us. In that stipulation the case is set down for *argument*, not *hearing*, and the term argument, when used with reserence to a demurrer or plea, has a technical signification, and means the argument of the sufficiency in law of the pleading, and not the hearing on the merits of the case—a signification which so technical and close a practitioner as Mr. Seward did not overlook when he drew the stipulation.

THE DECREE BELOW WAS FINAL.

The real question in this case, however, is whether the decree appealed from was final. The appellee tersely defines a final decree to be one which disposes, first, of the issues raised by the pleadings; second, of those created by the parties *pendente lite*, and urges that there were two issues of law raised by the pleadings as originally framed: 1st. "Was it "the public duty of the appellant to afford transportation "and other needful facilities to the appellee for the transpor-

" tation of its express matter and messengers and the conduct " of its business, whereby its private right might be sub- " served ? 2d. If so, what was a fair and reasonable rate of " compensation to be paid for such services by the appel- " lee ?" We are not particularly disposed to object to his definition of what constitutes a final decree, but shall comment somewhat upon his statement of what he is pleased to call the two questions of law raised by the pleadings.

It will be noticed in the argument of counsel for the appellee in this case that he seeks by ingenious inference rather than by direct assertion to convey the impression that the main question in this cause was to determine the compensation which ought to be paid by the express company for the services it demanded at the hands of the appellant, and that the question as to the right to demand these services was merely incidental. That such is not the case an examination of the ~~appeal~~ Bill in this case will conclusively show.

The whole controversy turns and did turn, not upon the amount of compensation to be paid for the exercise of a certain right, but upon the existence of the right itself. The bill in its general features has been sufficiently described in the other briefs filed in this case, and we shall only advert to it so far as is necessary to show that in this case at least the whole controversy turns upon the existence of the right claimed by the complainant in the case. The bill in substance sets forth a detailed statement of the rise, growth, and progress of the express business of the United States, and particularly of the Adams Express, and sets forth at length the contract made between it and the appellant on the 23d day of November, 1871, for doing business over the appellant's line of road. This agreement fixed the compensation to be paid by the express company for the services rendered, and provided that it was to take effect on the first of December, 1871, "and continue in force for one year there-

" after and until thirty days' notice shall have been given to " the other by the party desiring to terminate same." It is further averred that the contract was extended from time to time until the first day of December, 1880, and that during all that time the express company paid the compensation nominated, and avers its willingness to continue to pay the same " or such other just and reasonable compensa- " tion as the said defendant may be entitled to demand and " receive for a continuation of such facilities as are in such " contract specified." Notwithstanding such willingness, however, to pay whatever compensation may be demanded, it was notified on said last-mentioned day that it would be expected on the first of January, 1881, to retire from the operation of the express business on the road, as on and after that date the appellant intended to do the express business itself.

It further avers that " it is the purpose of the said defend- " ant, and that it intends, on the 1st day of January, 1881, " to exclude and eject the Adams Express Company, its " messengers and business, from its line of railway, and from " its cars, depots, and stations, and that, unless restrained by " the order of this court, it will carry such intention on said " date into practical effect, and will thereafter refuse to the " Adams Express Company, and to the public employing it, " the facilities heretofore granted for the transaction of ex- " press business." * * *

Paragraph XXXVI of the bill alleges " that if the said " defendant undertakes, on and after the 1st day of January, " 1881, to conduct the express business, as such business has " been practically defined by the demands of the public in " relation thereto, it will so undertake the same without " lawful or charter authority therefor, and without legal " right to a monopoly thereof, or to the sole and exclusive " enjoyment of its railway facilities in the conduct thereof,

"and that in such event the said Adams Express Company "will still have, as representing the public, as aforesaid, legal "rights in the premises to be protected by this court, by its "decree to be made herein." * * *

The prayer for relief in the bill is in substance that the appellant be restrained from ejecting it from its road "so "long as the said Adams Express Company shall be willing "and ready and offer to pay according to its present contract "rates with the said defendant, or such rates as shall be "equal to those paid by others who are afforded the same "facilities, or for such compensation as shall be equal to the "cost thereof, and during the pendency of this action, not "in excess of the aforesaid contract price."

Now, then, if we have correctly stated the substance of this bill and the purpose which it was intended to subserve, it must be very clear to the court that the material question involved was the existence at law of the right claimed by the express company to do business upon our line of road without our consent, and that the question of compensation is purely incidental, and is not and has not been, during the progress of this cause, the subject-matter of controversy. In effect, the express company asserts that it is entitled by law to carry on business upon our road precisely as it has hitherto done by virtue of a written contract, upon the payment of the same sum which it paid under that contract, and it asserts that we, making no claim that the compensation is not sufficient, deny its right to do business on the road, but demand that it leave, and by our demurrer we admit these facts and take issue upon the law. The express company say it has the right to do business on our road as it has hitherto done. That we deny. It says that we have no right under our charter to carry on the express business ourselves. We affirm that we have, and this is the only issue presented for the decision of the court, and finally

settled and determined by the decree from which we have appealed.

It was the only question of law raised by the issue, and we venture to say it is here asserted for the first time by counsel for the appellee that the amount of the compensation to be paid for a given service was, in the absence of any statutory provision, a question of law. A court of law is fully as competent as a court of equity to determine that question by the aid of a jury, it being solely a question of fact. When a question of law is decided it not only settles the merits of the case to which it is applied, but it establishes a precedent to be used in other cases of a similar kind. Suppose a circuit court has, in foreclosure proceedings, possession of a railroad by its receiver, and complaint is made by a person who has lost his leg that it was occasioned by the neglect of the receiver of the railroad company, his officers and agents, and ask leave to sue the receiver. The court, as it has full power to do, determines to hear the whole matter itself, and does so. From the facts in the case as developed before him he determines as a matter of law that the officers of the railway company were guilty of negligence by reason of which the complaining party suffered the loss of his leg, and without the intervention of a jury awards him $2,000 therefor. Would it be seriously claimed that the court had determined, as a matter of law, that $2,000 was the proper measure of damages for the loss of a leg? Could that finding with any degree of success be afterwards quoted in another court as settling, as a question of law, the value of a leg lost in a railway accident? And yet that is precisely the position assumed by counsel in the statement that there was left undetermined in this case a question of law, to wit: What compensation should be paid by the express company to our company for the use of its express facilities.

It will be seen, moreover, by an examination of the decree

in this case, that the court does settle, as conclusively and finally as it can, both the question of law and the question of fact involved. The decree, which is merely the opinion of the court reduced to the form of a decree, after making the injunction prayed for perpetual, provides specifically what the compensation shall be in these words:

"That the said Adams Express Company is entitled to "have, possess, and enjoy a continuance of the said facilities "and privileges for the conduct of its said express business "on the lines of the defendant's railway, as the same are "now had, possessed, and enjoyed, and until the further or- "der or decree of this court, at a rate not exceeding fifty (50) "per centum more than its actual rates for the transporta- "tion of ordinary freight, and not exceeding the rate at "which it may itself tranport express matter on its own ac- "count, or for any other express or other corporation, or for "private individuals, which compensation is to be paid by "said Adams Express Company on or before the 20th of "each month for the preceding month, and that said ex- "press company keep and render monthly to the defendant "a true account of the services performed for it by said de- "fendant."

It is objected that this decree is not final because the compensation to be paid is not fixed for all time to come, but only "until the further order and decree of this court." And it is claimed that the expression just quoted tends to show that the decree was merely interlocutory. That provision was added because of the obvious difficulty which a court would encounter in endeavoring to fix final compensation for all future time. It was manifest that to do so would not only be legislation, but unrepealable legislation, and the court, in its opinion, recognizing this difficulty, suggested the very mode to be adopted in the decree. Judge Miller, in his opinion, says:

"While I doubt the right of the court to fix in advance "the precise rates which the express companies shall pay "and the railroad companies shall accept, I have no doubt "of its right to compel the performance of the service by the "railroad company, and, after it is rendered, to ascertain the "reasonable compensation and compel its payment.

"To permit the railroad company to fix upon a rate of "compensation which is absolute, and insist upon the pay- "ment in advance or at the end of every train, would be to "enable them to defeat the just rights of the express com- "nies, to destroy their business, and would be a practical "denial of justice.

"*To avoid this difficulty*, I think that the court can assume "that the rates, or other mode of compensation heretofore "existing between any such companies, are *prima facie* rea- "sonable and just, and can require the parties to conform "to it as the business progresses, with the right to either "party to keep and present an account of the business to "the court at stated intervals, and claim an addition to, or "rebate from, the amount so paid."

This decree, we say, was framed in accordance with that suggestion, fixing finally, so far as it could, the rates to be paid, but reserving to either party the right at any time to ask for such changes in the compensation as future exigencies might show to be just; but so far as the decree was concerned for the purpose of procuring an appeal, the rate was fixed as is shown in the language heretofore quoted. And if it is not final, it is impossible, in the opinion of the court, whose opinion I have quoted, ever to make a final decree upon that subject. The consequence will be, by reason of the inability of the court, or its lack of power to provide the compensation for all time to come, that there would be presented a continuous and insuperable barrier to any appeal on the part of the appellant. With the right to ask for a modification of the rate of compensation reserved to either party, the appellee could, at his own pleasure, continually de-

feat the finality of any decree by applying, as he has done in this case, or might properly do under the decree, for an order for the appointment of a master to determine the rate of compensation therefor. As often as we should get a decree which should be final in its nature so far as it could be made final, the appellee could, if his argument is sound in this case, by supplemental proceedings, such as he took on the 8th of June, 1882, claim that the order thereupon made destroyed the finality of the original decree, and made it interlocutory in its nature. It surely cannot be seriously contended that a party in whose favor a decree has been rendered shall have it in his power to prevent by his own action the appeal from any decree made by the court.

The discussion as to what constitutes a final decree under the authorities has been so fully presented to this court, in the brief of associate counsel, that we shall make no citation of authority, and content ourselves with the suggestion, more than once made by this court, that the question as to the finality of a given decree must be determined largely by the circumstances of a particular case; that no general and arbitrary rule can be deduced which will govern all cases; and the rule itself, that an appeal from a decree not final in its nature must be dismissed, has been, as this court has said, carried to its utmost limit, and it certainly seems safe to assume that if a decree is so final that there is nothing left undetermined which might subsequently be the subject of a separate appeal, that such a decree is final and subject to review in this court. That the appellee considered this decree to be final ought to be conclusively settled by this clause of the decree: "It is further adjudged and decreed that the complainant "recover of the defendant herein the costs in this cause, "taxed at $503.40, with interest from the date of this decree "until paid, *and that said complainant have execution there-* "*for.*" Here it will be seen is a final and absolute decree

for the costs of the cause in a sum definite and certain, and for the non-payment of which our property may be seized by the officers of the court and sold without redress or remedy upon our part, unless we have a right to appeal to this court from that decree.

A. L. Williams

WILLIAMS & DILLON,

Att'ys for Appellant.

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OFFICE SUPREME COURT U. S.
FILED
JAMES H. McKENNEY, CLERK

Supreme Court of the United States.

No. 994.

WILLIAM B. DINSMORE, AS PRESIDENT OF THE ADAMS EXPRESS COMPANY AND A SHAREHOLDER THEREIN,

Appellee,

vs.

THE MISSOURI, KANSAS, AND TEXAS RAILROAD COMPANY,

Appellant.

MOTION TO DISMISS APPEAL, OR FOR CERTIORARI.

BRIEF OF APPELLANT.

A. T. BRITTON,
J. H. McGOWAN,
WILLIAMS & DILLON,
Of Counsel for Appellant.

THOS. J. PORTIS,
Solicitor for Appellant.

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1882.

Supreme Court of the United States.

WILLIAM B. DINSMORE, as President of the Adams Express Company and a Shareholder therein, Appellee,
vs.
THE MISSOURI, KANSAS, AND TEXAS RAILWAY COMPANY, Appellant.

No. 994.

Answer of Appellant to Motion to Dismiss Appeal or for Certiorari.

In November, 1871, appellant contracted with the Adams Express Company for the transaction of express business over appellant's railroad. By its terms said contract was to continue for one year, and from year to year thereafter until terminated by thirty days' notice from either party. On the 1st December, 1880, such notice was served in due form by appellant upon the Express Company, notifying them to terminate the contract on January 1, 1881.

Thereupon William B. Dinsmore, as President of the Adams Express Company and a shareholder therein, filed his bill of complaint in the Circuit Court of the United States for the District of Kansas, praying that the Railroad Company should be enjoined from interfering with or dis-

turbing in any manner the transaction of its business by the Express Company as then and theretofore enjoyed, and should continue thus enjoined so long as the Express Company offered to pay either according to its present contract, or according to same rates paid by others enjoying the same facilities, or according to the actual cost thereof, not in excess of the present contract price.

Answer by the defendant and replication by the complainant were duly filed, and a temporary restraining order granted.

Thereafter the complainant filed a supplemental bill setting forth other and further allegations of fact, and praying that the defendant should be decreed to allow the Adams Express Company equal facilities for the transaction of its business as was afforded the Pacific Express Company, and at such rate of compensation as the court might fix.

Thereupon, by leave of the court first had and obtained for that purpose, the defendant withdrew the answer theretofore filed and interposed a demurrer to the original and supplemental bills of complaint, which, after argument by counsel, was overruled by the court.

The defendant elected to stand by his demurrer and declined to make any further answer.

Thereupon the court entered up decree in favor of complainant, from which defendant appealed to this court.

The appellee has moved this honorable court to dismiss said appeal upon the dual ground of the insufficiency of the clerk's certificate to the transcript and of want of finality in the decree appealed from. If this motion fails he suggests a diminution of the record, and prays a writ of certiorari to bring up certain "depositions, proofs, testimony, and evidence" alleged to be on file in the court below.

To all of which we respectfully make answer.

I.

The first ground for motion to dismiss is that the certificate appended to the transcript is not the certificate required by law.

The certificate is as follows:

"UNITED STATES OF AMERICA, } ss:
"*District of Kansas*, }

"I, A. S. Thomas, Clerk of the Circuit Court of the United "States of America for the District of Kansas, do hereby "certify the foregoing to be a true, full, and perfect copy "from the record of all the proceedings in the suit of Wil- "liam B. Dinsmore, as President of the Adams Express "Company and a shareholder therein, *vs.* The Missouri, "Kansas, and Texas Railway Company, No. 3307, in said "court.

"In testimony whereof I have hereunto set my hand and "affixed the seal of said court, at my office in Topeka, "in said District of Kansas, this 30th day of August, 1882.

"A. S. THOMAS,
"*Clerk.*
"By GEORGE M. HOLMES,
"*Deputy.*"

Rule 8 of this court provides as follows:

"1. The Clerk of the Court to which any writ of error "shall be directed may make return of the same, by trans- "mitting a true copy of the record, and of all proceedings "in the cause, under his hand and the seal of the court.

"2. In all cases brought to this court, by writ of error or "appeal, to review any judgment or decree, the clerk of the "court by which such judgment or decree was rendered "shall annex to and transmit with the record a copy of the "opinion or opinions filed in the case.

"3. No cause will hereafter be heard until a complete "record, containing in itself, without references *aliunde*, all "the papers, exhibits, depositions, and other proceedings

" which are necessary to the hearing in this court, shall be " filed."

The third subdivision of this rule substantially embodies the provision of the statute relating to transcripts on appeal. (R. S., sec. 698 :)

" Upon the appeal of any cause in equity or of admiralty " and maritime jurisdiction, or of prize or no prize, a tran- " script of the record as directed by law to be made, and copies " of the proofs, and of such entries and papers on file as may " be necessary on the hearing of the appeal, shall be transmit- " ted to the Supreme Court."

It is now objected that the form of the clerk's certificate is not sufficient, inasmuch as it does not certify the transcript to contain the " bill, answer, depositions, and all other " proceedings of what kind soever in the cause." Neither the rule nor the law undertakes to fix the *form* of the certificate. The rule may properly be treated as the interpretation which this court has given the statute. If " all the " papers, exhibits, depositions, and other proceedings which " are necessary to a hearing in this court" be transcribed and filed it is sufficient as to the transcript. A certificate, in any form, which informed the court that this had been done, must be sufficient.

In the United States *vs.* Gomez, (1 Wal., 690,) which was a motion to dismiss an appeal, one of the grounds for the motion was that the transcript was not certified according to law. The certificate was in this form : " That the foregoing " one hundred and seven pages are a full, true, and correct " copy of all the proceedings, entries, and files in the District " court of the United States for the Southern District of Cal- " ifornia, *except* the transcript sent up from the Board of " Land Commissioner in the case of the United States *vs.* " Vincente Gomez, No. 393, on the docket of the said court, " for the claim called *Panoche Grande*."

Mr. Justice Clifford, in delivering the opinion of the court, says: "The third ground of the motion is that the transcript "is incomplete, and that the same is not duly certified. "The certificate in this case is certainly made by an officer "authorized by law to make it, *and we are not able to per-* "*ceive that it is defective.*"

The language of the certificate in the case just cited and that in the case under consideration is almost identical. In U. S. *vs.* Gomez the officer certifies the transcript to be "a "full, true, and correct copy of all the proceedings, entries, "and files," while in the case at bar the words are "a true, "full, and perfect copy from the record of all the proceed- "ings in the suit, &c." It is true that in the former case the certificate explicitly *excepts* certain portions of the record as not being embraced in the transcript. This would simply render it more obnoxious to the construction sought to be given by the counsel for the appellee. Yet this court held it sufficient.

If, however, the certificate should be found defective in form, the remedy is not found in a motion to dismiss. Upon application, leave will be granted in such cases to enable the clerk of the court below to append the necessary certificate. (Hodges *vs.* Vaugan, 19 Wal., 12.)

Where the certificate was *entirely wanting* a motion to dismiss was allowed, but in connection therewith a motion to withdraw the record was also granted. (Blitz *vs.* Brown, 7 Wal., 693.)

But where the certificate shows the transcript to be made in compliance with the rule, to dismiss the appeal on a mere matter of form would be manifestly unjust.

II.

The second point made by appellee is that the averment

of the certificate that the transcript was "a true, full, and per-"fect copy from the record of all the proceedings in the suit" is not correct.

It is true that the transcript does not contain a copy of any proofs or depositions of witnesses. If any such proofs were taken they related to the issues raised by the answer filed to complainant's original bill. But the record shows that before the decree in question was made, defendant below, by leave of the court, withdrew its answer and filed demurrer to both the original and supplemental bills. The appellee joined in the argument on the sufficiency of the demurrer. The demurrer was overruled, and the appellant elected to stand on its demurrer. The decree was rendered on the bill of complaint and the supplemental bill taken as confessed. From this decree the appeal was taken. It could have no relation whatever to either the answer, which had been withdrawn, or any proofs taken. No reference to such proofs is made in the decree. All the conclusions therein and findings of fact are drawn from the bill of complaint and supplemental bill. The court could consider nothing else.

We shall show hereafter that whatever proofs purport to have been taken in the case were irregularly and improperly taken, as the appellee at the time well knew. But admitting, for the purposes of the argument, that the proofs were properly taken, it must be apparent that they had no relation to the issues raised by the demurrer. The case having been finally decided on other issues than those to which the proofs must have been addressed, the transcript, as it appears here, is complete and sufficient under the statute and the rule, which require copies of only such proceedings "as are neces-"sary to the hearing in this court." (Owens *vs.* Harney, 9 Cr., 180.) Counsel for appellee declare that the sixth paragraph of the decree is founded entirely upon the proofs in

the case. An examination of the bill of complaint and supplemental bill discloses that all the findings of the decree both of law and fact, are drawn for the bills. The court had no occasion to refer to any proofs, neither had it the right to do so.

If we are right that the court below could not use proofs, taken on bill and answer, to make up its decree based on the bill taken as confessed after demurrer overruled, then there is no diminution of the record in this case. The question raised here by the appeal is the correctness of the decree overruling the demurrer and fixing the rights of the parties. If that was such final decree as to be properly brought here on appeal, it will not be necessary to the hearing in this court that the transcript should contain the statements of witnesses sworn in another issue.

There is another conclusive answer to the suggestion of a diminution of this record, on the absence of depositions, proofs, &c.

Issue in the cause was joined, as claimed by appellee, by the filing of replication on the 15th day of March, 1881. Notice that oral evidence would be taken and of application to the court for the appointment of an examiner was first given September 30, 1881, and the depositions in question were not taken until the 12th day of November, 1881. Here were nearly eight months between the joining of the issue and the taking of the testimony. There is no order in the record enlarging the time in which testimony could be taken, and no petition for such order. Rule 69 of the Rules of Practice in equity of this court provides that: "Three "months and no more shall be allowed for the taking of "testimony after the cause is at issue, unless the court or a "judge thereof shall, upon special cause shown by either "party, enlarge the time; and no testimony taken after

" such period shall be allowed to be read in evidence at the " hearing."

The appellee has sought to vigorously enforce every technicality against the appellant. In view of the facts of his case, and the rule just cited, how could he ask the court to consider, for any purpose, the depositions in question? The rule says "they shall not be allowed to be read in evi- " dence at the hearing." Then why cumber the record with them?

III.

The appellee insists that the appellant had no lawful right to withdraw its answer and substitute a demurrer.

The record shows the following order of pleading: Original bill of complaint, filed December 28, 1880; answer thereto, filed March 15, 1881, and replication filed the same day. On the 15th of April, 1881, (one month after the issue was joined by filing replication,) the complainant put on file in the case what was entitled a "supplemental bill," the first prayer in which was "that this bill may be filed as a supple- " mental bill, or as a supplement to the original bill herein."

If this was a supplemental bill it was filed in violation of Rule 57 of the Rules of Practice in Equity of this court, as the record shows that no leave was "granted by any judge " of the court on any rule day, upon proper cause shown, " and due notice to the other party."

If it was in the nature of a supplement or amendment to the original bill, it was in violation of Rule 29. That rule provides that "after replication filed, the plaintiff shall not " be permitted to withdraw it and to amend his bill, except " upon a special order of a judge of the court, upon motion " or petition, after due notice to the other party, and upon " proof by affidavit that the same is not made for the pur- " pose of vexation or delay, or that the matter of the pro-

" posed amendment is material, and could not with reason-
" able diligence have been sooner introduced into the bill,
" and upon the plaintiff's submitting to such other terms as
" may be imposed by the judge for speeding the cause."

No such order, motion, notice, or affidavit appear in the record.

Although well aware of this irregularity, the appellant sought no advantage from it, but treated the so-called supplemental bill as properly filed in the cause, and, in pursuance of the requirements of Rule 57, that "defendant shall " demur, plead, or answer thereto," filed its general demurrer on the 16th day of May, 1881, thirty days after the filing of the supplemental bill.

It now transpires that the counsel for the appellant failed to comply with the requirements of Rule 31 in not attaching the certificate of the counsel, and the affidavit of the defendant to the demurrer, as the counsel for appellee had failed in filing their supplemental bill to comply with the requirements of Rules 29 and 57.

Counsel for appellee were aware that the demurrer had been placed on file in the case. A copy was served on them before any proofs were taken. Yet, when the case came on for hearing on the 8th of June, 1882, objection was made that the demurrer was not properly in the case. The court, evidently aware of the facts as here stated, made an order allowing the answer to be withdrawn and demurrer interposed. Under the statute and the provisions of Rule 32 it was perfectly competent for the court to do this. The rule provides that—

" The defendant may at any time before the bill is taken
" for confessed, or afterwards with leave of the court,
" demur or plead to the whole bill or to part of it, &c."

If there was any further question as to the power of the

court to allow the demurrer to be interposed it would seem to be conclusively settled by section 954 of the Revised Statutes, which empowers the "court to permit at any "time, either of the parties to amend any defect in the "process or pleadings." (See Bamberger *vs.* Terry, 13 Otto, 40.)

In Kern *vs.* Hindekoper (13 Otto, 485) the action was one of replevin. After the declaration, plea, and replication had been filed, the defendant, by leave of the court, filed a plea to the jurisdiction. The plaintiff demurred to this plea and the court sustained the demurrer, but the defendant electing to stand on his plea judgment was given plaintiff for the goods. The case was brought here on error, the plaintiff in error contending, among other things, that the court below should not have entered judgment against him after sustaining the demurrer to his plea to the jurisdiction, because there was still remaining his plea to the merits.

Justice Wood, speaking for the court, says:

"The facts disclosed by the record make it clear that "there is no solid ground for this assignment to stand on. "The plea of November 12, 1878, was a plea to the juris- "diction. The defendant was allowed to file it on special "leave asked by him and given by the court.

"The asking of leave to plead to the jurisdiction was in "effect a withdrawal of the plea to the merits, for after a "plea in bar the defendant cannot plead to the jurisdiction "of the court, for by pleading in bar he submits to the "jurisdiction. * * * * The plea in bar being in effect "withdrawn by plea to the jurisdiction, when the demurrer "to the latter was sustained, the defendant was left without "plea.

"If the defendant had so desired the judgment of the "court would have been *respondeat ouster*. But he elected, "as the record shows, to stand by his demurrer and declined "to make any further answer. There was nothing then left

"for the court to do but to pronounce judgment against "him, which was done.

"There was no error in this. The suggestion that there "should have been a trial upon the plea in bar appears to "have been an afterthought."

In view of the statute allowing amendments, and the foregoing decision, it can scarcely be contended that the appellant, after putting in its answer, "could not properly raise "the questions of jurisdiction sought to be raised by the de-"murrer."

Again, for counsel to say that the court could not allow the answer to be withdrawn and demurrer interposed, is to say that the court could not make the decree in question. If the court acted illegally and in violation of the rights of appellee in making the order allowing demurrer to be filed, it certainly was illegal to make the decree upon the bill of complaint as confessed. Hence, should this court hold with the appellee on this point, it should also direct that the decree be set aside and the case be heard upon the pleadings, and proofs claimed to have been taken.

The counsel for the appellee, in his brief under this same head, claims that after the issue was joined on bill, answer, and replication, the complainant had a *vested right* to have his cause tried upon the merits.

We know of but one kind of bill that may be filed by a complainant that will entitle him to demand an answer or in any sense invest him with *vested rights*, namely, bills of discovery. That is not this case. (See Brown *vs.* Swann, 10 Pet., 497.)

V.

The decree was final, and an appeal would lie.

This case differs in one essential particular from any of the cases found in the reports. The Express Company seeks,

by the aid of the courts, to compel the Railroad Company to furnish cars and other necessary facilities for the purpose, and forever carry the express matter and messenger of the appellee, and asks that the court should fix the terms of compensation for that service. From the necessities of the case no fixed terms of compensation can be determined in advance. They must be fixed from time to time as circumstance alter, and usually *after* the services have been performed. Hence from the very nature of the case no decree can be made which will finally and forever dispose of the question of compensation. To this extent the case under consideration cannot be classified with any of the reported cases. But the general principle which determines whether the decree of a lower court is subject to appeal can readily be applied.

From the various decisions of this court the rule as to what is a final decree, subject to appeal, may fairly be deduced as follows:

Where the decree is final upon the merits it is a final decree to which appeal will lie.

That the court retains jurisdiction of the cause for the purpose of enforcing by any means the provisions and requirements of the decree, does not affect the rule.

Under this rule a decree based on bill of complaint taken as confessed, upon overruling a general demurrer, is always subject to appeal.

This court, in Forgay *vs.* Conrad, (6 How., 201,) by Taney, C. J., announced the rule in that case as follows:

"When the decree decides the right to the property in "contest, and directs it to be delivered up by the defendant "to the complainant, * * * and the complainant is en- "titled to have such decree carried immediately into execu- "tion, the decree must be regarded as a final one to that "extent, and authorizes an appeal to this court, although "so much of the bill is retained in the Circuit Court as

" is necessary for the purpose of adjusting by a *further de-*
" *cree* the accounts between the parties pursuant to the de-
" cree passed."

In Thompson *vs.* Dean, (7 Wal., 342,) the court reviews the *Forgay* case, and declares the rule there laid down to be the true one. The court also says of the case then under consideration: " So far as the court below was concerned, " the decree in the case determined the principal matter in " controversy between the parties. And since the decree " could not be changed except through a new and distinct " proceeding, it determined the matter finally."

The case of Stoval *vs.* Banks (10 Wal., 583) was brought to this court on writ of error, but the principal question was whether a certain decree made by a chancery court in Georgia was final.

Justice Strong, speaking for the court, says:

" It cannot be maintained that a decree which adjudges a
" certain sum of money to be due from the defendant to the
" complainant, and awards execution to collect it, is not a
" final decree conclusive upon the parties. We do not over-
" look the fact that in this instance the court, after having
" determined the sum due to each of the complainants and
" directed its payment, and, after having awarded execution,
" went on to direct that the administrator be allowed as pay-
" ment to the respective parties to be deducted from the
" amounts therein adjudged to them the principle and interest
" of any note held by him against either of them. It also
" directed that the several shares of the parties to whom the
" estate was awarded should be subjected to ratable deduc-
" tion for fees yet unpaid for the collection of notes belong-
" ing to the administrator. But we think the decree was not
" for this reason the less final.

" Even if the sum decreed was left indeterminate, it was
" certainly adjudicated that the complainants were entitled
" to participate in the distribution, and the extent of their
" interest was defined."

Again the court says in this case:

"It is not unusual in courts of equity to enter decrees de-
"termining the rights of the parties and the extent of the
"liability of one party to the other, giving at the same time
"the right to apply to the court for modifications and di-
"rections. It has never been doubted that such decrees are
"final."

And on this point the court quotes Daniel's Chancery Practice, as follows:

"A decree with such a liberty reserved is still a final de-
"cree, and, when signed and enrolled, may be pleaded in
"bar to another suit for the same matter."

Also quotes approvingly Mills *vs.* Hoag, (7 Paige, 19,) that "a decree is not the less final in its nature because some "future orders of the court may possibly become necessary "to carry such final decree into effect."

As early as 1839 this court, in Whiting *vs.* Bank of United States, (13 Pet., 15,) in commenting on a still earlier case, said:

"In Ray *vs.* Law, (3 Cranch, 179,) it was held by this
"court that a decree of sale of mortgaged premises was a
"final decree in the sense of the act of Congress, upon which
"an appeal would lie to the Supreme Court."

The court then adds:

"This decision must have been made upon the general
"ground that a decree, final upon the merits of the contro-
"versy between the parties, is a decree upon which a bill of
"review would lie without, and independent of, any ulterior
"proceedings. Indeed, the ulterior proceedings are but a
"mode of executing the original decree, like the award of
"an execution at law."

In Beebe *vs.* Russell (19 How., 283) the court sustained the motion to dismiss. The bill in that case prayed that the defendants might be ordered to convey to the complainant certain pieces of property which, it was alleged, they fraudulently withheld from him, *and account for the rents and profits.*

Here were two distinct things to be settled by decree: 1, the question of conveying the property mentioned; 2, accounting for the rents and profits.

The court passed upon one of these questions and decreed that the conveyances should be made, and consequent possession surrendered. Its decision upon the second issue it held in abeyance, and referred the matter to a master, with instructions to take an account of the rents and profits, and other evidence touching the relative rights of the various defendants, and report the same to the court at the next term. This was preparatory to a final decision upon the whole subject-matter of the suit. The decree did not decide and dispose of the whole merits of the cause. The question of rents and profits was not necessarily dependent upon reconveyance. It was a separate and substantive matter of controversy, which was reserved by the court, to be settled by a final decree upon the coming in of the master's report.

The court draws this distinction, and properly finds that a further decree of the court was necessary to dispose of the whole merits of the cause. Yet it is distinctly stated in this case that a decree may be final, although it directs a reference to a master, if all the consequential directions depending upon the result of the master's report are contained in the decree. In other words, if the reference is in pursuance of the decree already made, and simply to carry its provisions into effect, then it in no way affects its character as a final decree. On the contrary it indicates that it is final.

In the case to which we have just referred (Beebe *vs.* Rus-

sel) the court discusses the cases of *Whiting* vs. *Bank of the United States* and *Forgay* vs. *Conrad*, and approves the rule laid down in those cases. In the latter case the court say that the decree was held to be final "upon the ground that "the whole merits of the controversy between the parties "had been determined; *that execution had been awarded*, "and that the case had been referred to the master merely "for the purpose of adjusting the accounts." The *italics* are found in the report, and indicate the importance the court attaches to the fact that the decree was for costs and execution awarded. The *Forgay* case is especially approved and referred to as "confirmatory of what we have said in "this case."

In Withenbury *vs.* U. S., (5 Wall., 819,) several libels for condemnation as prize of war of large quantities of captured cotton had been filed. On motion these libels were consolidated, and then various claims were interposed for portions of the property libelled. Among these was that of Withenbury and Doyle, denying validity of the capture and insisting on their own title to one lot of the cotton. An order was made dismissing *this* claim with costs. Similar and separate orders were made as to other claims of other parties. Separate appeals prosecuted, the residue of case being unadjudicated.

Motion to dismiss for want of finality because there could not properly be several sets of adversary claims, each splitting off from main case and from each other, whilst the main case still remained in inferior court.

Motion denied, because the decree was final as to these parties.

In French *vs.* Shoemaker (12 Wal., 86) a motion was made to dismiss on the ground that the decree was not final. The bill on which the decree was based alleged several

causes of complaint and closed with several prayers for relief. The decree closed with the following language:

"It is further ordered, adjudged, and decreed, that the "said defendant, French, pay the costs in this cause, and "leave is given to either party to apply at the foot of this "decree for such further order as may be necessary to its "due execution, or as may be required in relation to any "matter not finally determined by it."

The decree was made by Chief Justice Chase.

It was argued on the motion that this language showed the decree was not meant to be final. The court, speaking by Justice Clifford, said:

"Leave, it is true, is given to either party to apply at the "foot of the decree for such further order as may be necessary to the due execution of the same, or as may be required in relation to any matter not finally determined by "it, but it is quite apparent that that reservation was superadded to the decree as a precaution, and not because the "court did not regard the whole issue between the parties "as determined by the decree."

Again:

"Several cases might be referred to where it is held that "a decree of foreclosure and sale of mortgaged premises is "a final decree, and that the defendant is entitled to his appeal without waiting for the return and confirmation of "the sale by a decretal order, upon the ground that the "decree of foreclosure and sale *is final as to the merits*, and "that the ulterior proceedings are but a mode of executing "the original decree."

"Unquestionably the *whole law of the case* before the "court was settled by the Chief Justice in that decree, and "as nothing remains to be done, unless a new application "shall be made at the foot of the decree, the court is of the "opinion that the decree is a final one, *as it has conclusively*

" *settled all the legal rights of the parties involved in the* " *pleadings.*"

This is undoubtedly what distinguishes a final decree from a decree not subject to appeal. A final decree is one that settles " the whole law of the case," that " conclusively set- " tles all the legal rights of the parties." It in no wise affects the finality of a decree that other decretal orders, or even formal decrees, may be necessary to carry into effect the original decree that *settles the law of the case.* That decree is final in contemplation of the statute. The subsequent orders and decrees made in the case may in turn be subject to appeal, but this court has constantly held that that fact cuts no figure in determining whether or not the first decree was final. Decrees of foreclosure and sale are invariably held as subject to appeal. Yet the final order made on the report of the master who makes the sale is equally liable to appeal.

In Sage *vs.* Railroad Company (6 Otto, 714) Chief-Justice Waite says:

" No reversal of any order hereafter made will necessarily " divest this title. The proceedings hereafter will relate " only to the disposition of the property acquired by the " purchase and the proceeds of the sale. *For relief against* " *the sale* (which was ordered by the decree) *resort can alone* " *be had to an appeal from the decree of confirmation.*"

The rule we deduce—that a decree final on the merits is subject to appeal—is not controverted anywhere, and is frequently asserted in the cases we have cited. This being true, it follows as a corrollary that a decree rendered on a bill taken as confessed is final. When such a decree reaches this court on appeal the only question the court can consider is whether the allegations and prayers of the bill are sufficient to support the decree.

That was the decision of the court in Masterson *vs.* Howard, (18 Wal., 99,) where an appeal was taken from a decree made by the Circuit Court for the Western District of Texas. In that case one of the original defendants made no answer, the other answered by leave of the court after an order *pro confesso* had been entered, but failed to comply with the conditions imposed when the leave was granted. This answer was stricken out of the case, and a decree entered upon the bill taken as confessed.

Mr. Justice Field, in delivering the opinion of the court, says:

"The only question, therefore, for our consideration upon "the record is whether the allegations of the supplemental "bill, and the original bill to which it refers, are sufficient "to support the decree *thus entered upon the default of the* "*defendants.*"

A brief examination of the bill of complaint, supplemental bill, and decree in this cause will show that the foregoing citations fully sustain this appeal.

For nine years the Adams Company had enjoyed a monopoly of the express business over appellant's railroad by virtue of the written contract of November, 1871. Such contract was in process of termination, according to its own terms. That process of lawful termination was interrupted and suspended by the Dinsmore bill of complaint, which, conceding that the express business had theretofore been conducted solely *ex contractu*, asserted that as common carriers the railroad company was obligated to perpetually permit the Express Company to continue the enjoyment of its special transportation facilities, and prayed an order restraining any interference therewith. The correctness of that position constituted the *merits* of this controversy. A decree which settled that question, specifically reciting that the cause was sub-

mitted to the court upon the pleadings alone, was necessarily final.

Now the decree of June 8, 1882, ordered and adjudged "that the said Adams Express Company is entitled to have, "possess, and enjoy a continuance of the said facilities and "privileges for the conduct of its said express business on "the lines of the defendant's railway as the same are now "had, possessed, and enjoyed, and until the further order or "decree of this court, at a rate not exceeding fifty per "centum more than its actual rates for the transportation of "ordinary freight, and not exceeding the rate at which it "may itself transport express matter on its own account, or "for any other express or other corporation, or for private "individuals, which compensation is to be paid by said "Adams Express Company on or before the 20th of each "month for the preceding month, and that said Express "Company keep and render monthly to the defendant "a true account of the services performed for it by said de-"fendant."

The defendants were perpetually enjoined and restrained from "interfering with or disturbing in any manner" the enjoyment of all its previous facilities for the transaction of its express business, and—

"*It is further ordered and adjudged and decreed that the* "*complainant recover of the defendant herein the costs in* "*this cause, taxed at five hundred and three dollars and* "*forty cents, with interest from the date of this decree till* "*paid, and that said complainant have execution therefor.*"

This decree concludes the merits of the controversy. It determines the right of the Adams Company to the continued and undisturbed enjoyment of its express facilities; it fixes the compensation to be paid therefor, and it awards execution for a specific sum of money. In the event of non-pay-

ment by the defendant corporation, its property would be subject to levy and sale.

The argument against the finality of this decree is in fact based upon the supplemental petition of the complainant and decretal order of June 8, 1882. The petition averred that by reason of the enjoyment of similar business facilities by the Pacific Express Company over defendant's railroad, the volume of business performed by the Adams Company had been considerably diminished, and that the amount of compensation which the Adams Company had been and was paying was in excess of a just compensation. Wherefore it prayed the appointment of a master to take testimony upon that point, and to report the evidence to the court. The court thereupon appointed such special master, and ordered that upon the filing of his report "either party may "have leave to apply to the court for such further relief or "decree thereon as to said measure of compensation as may "be just and equitable."

There is nothing in the final decree to which this petition and order could attach except the one sentence, "and until "the further order and decree of this court." Assuming that to be a sufficient connection, the case still falls within the doctrine of Stovall *vs.* Banks, (10 Wall., 587:)

"It is not unusual in courts of equity to enter decrees de-"termining the rights of parties, and the extent of liability "of one party to the other, giving at the same time a right "to apply to the court for modifications and directions. It "has never been doubted that such decrees were final."

And in Thompson *vs.* Dean, (7 Wall., 345:)

"So far as the court below was concerned, the decree in "the case determined the principal matter in controversy "between the parties. And since the decree could not be

" changed except through a new and distinct proceeding, it " determined the matter finally."

We do not overlook the claim of counsel that by reason of the order of sequence in the printed record such appointment of a special master must have preceded the final decree. No such conclusion fairly results from a mere order of sequence in the transcript. There is not an intimation in the final decree to support such a claim. The cause being before the court on bill taken as confessed, there was obviously no room for such a petition and order to take testimony until the main rights of the parties were settled by final decree. Until that was effected, there was no conceivable issue to which the taking of testimony could be directed.

This is, however, immaterial, because even if this supplemental order on petition filed had been incorporated in and formed part of the main decree, it would not have affected its finality for the purpose of appeal. It simply gave leave to either party after submission of the master's report " to ap- " ply to the court for such further relief or decree thereon " as to said measure of compensation as may be just and " equitable." Neither party has so applied, so far as the record or the motion papers disclose, and, as we understand the fact to be, the compensation has continued to be paid and all other things done according to the terms of the final decree.

We conclude with suggesting that the contention of counsel for the appellee, if sustained, would forever deny to the Railroad Company the power to invoke the appellate authority of this honorable court. The principle upon which its application for the appointment of a master is based implies a rate of compensation subject to constant revision by the court upon petition filed by either party. Its ascertainment for one period of time does not necessarily control its ascer-

tainment for another period. The admission or the withdrawal of rival express companies to or from the transaction of business over defendant's railroad; the prosperity or otherwise of general transportation business in the country; the changes in the rates at which the railroad could transact business for general shippers; the effect upon rates of State or Federal legislation, and similar considerations going to the fixing of a fair compensation, would introduce a constantly fluctuating scale of adjustment. If, then, the defendant's right of appeal is controlled by a decree which must finally settle rates of compensation, it can be forever kept in abeyance. The complainant may, as in present instance, continually invoke the supervision of the inferior court and practically deny our right of appeal. It is not believed that this court will sanction a doctrine leading necessarily to such an inequitable result. Whilst the case is *sui generis*, the decree appealed from is final within the meaning of the act of Congress and the rules and decisions of this court.

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J. H. McGOWAN,
WILLIAMS & DILLON,
Of Counsel for Appellant.

THOS. J. PORTIS,
Sol'r for Appellant.

FILED

Supreme Court of the United States.

THE SOUTHERN EXPRESS COMPANY,
Appellee,

vs.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
Appellant.

No. 914.

MOTION TO DISMISS APPEAL,

AND

PETITION AND BRIEF

IN SUPPORT THEREOF.

GLOVER & SHEPLEY,
S. M. BRECKINRIDGE,
CLARENCE A. SEWARD,
F. E. WHITFIELD,
Of Counsel for the Motion.

NEW YORK:
DOUGLAS TAYLOR, BOOK AND LAW PRINTER, 89 NASSAU ST., COR. FULTON.
1882.

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Supreme Court of the United States.

THE SOUTHERN EXPRESS COMPANY,
Appellee,

vs.

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Appellant.

No. 914.

And now comes the appellee, and respectfully moves the Court, upon the petition hereto annexed, to dismiss the appeal herein, upon the following grounds:

I.—This Court has no jurisdiction of such appeal.

II.—The decree appealed from was and is not final.

III.—The decree appealed from was and is interlocutory or provisional only.

IV —The decree appealed from does not decide all the issues between the parties, or those raised by the pleadings, and as to which the larger portion of the evidence contained in the transcript was addressed.

V.—The decree appealed from on its face leaves such issues pending and undetermined in the Circuit Court, which is proceeding to determine the same.

VI.—The appeal was taken before the end of the term at which such decree was pronounced.

VII.—Such decree was modified by the Circuit Court at the same term at which it was pronounced by a further interlocutory or provisional decree, under which proceedings are still pending in said Circuit Court.

VIII.—The said appeal was and is premature.

November , 1882.

GLOVER & SHEPLEY,
S. M. BRECKINRIDGE,
CLARENCE A. SEWARD,
F. E. WHITFIELD,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

THE SOUTHERN EXPRESS COMPANY, *Appellee,*
vs.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, *Appellant.*
No. 914.

To the Supreme Court of the United States:

The petition of the Southern Express Company, appellee herein, respectfully represents:

I.—The transcript from the Clerk's Office of the Circuit Court of the United States for the Eastern District of Missouri has been filed herein, and as so filed contains over 1,880 printed and manuscript pages, the major portion of which contains printed copies of the depositions of witnesses called to support various issues between the parties, and raised by the pleadings.

II.—It appears from the bill in such transcript that heretofore and prior to the 26th day of March, 1880, the Southern Express Company had been and was then in the enjoyment of all the usual express facilities upon the defendant's railway, under two written contracts in said bill set forth, wherein such facilities are particularly described, and wherein a stipulated compensation was nominated and agreed to be paid therefor.

III.—It in like manner further appears that on the 26th of March, and on the 23d of April, 1880, the railway company notified the express company that such contracts would be terminated on and after a given date, and that on the 15th of May, 1880, the railway company notified the express company that the railway "company had determined to transport all express matter, and transact all express business on its own account, and through and by its own officers and agents, on and after the 1st day of June next, in its own cars and over its own roads."

IV.—It in like manner further appears that the bill herein was filed on the 21st of May, 1880. It prayed in substance, that the railway company might be restrained during the pendency of the suit, by a preliminary injunction, from interfering with or disturbing the business of the express company, from excluding or ejecting any of its express matter or messengers from the depots, cars, or lines of the said defendant, as the same had been theretofore enjoyed and occupied by the express company, and from refusing to receive and transport, in like manner as the defendant was then doing, such express matter and messengers, so long as the express company should be willing and ready, and offer to pay according to legal rates therefor. The said bill also specifically prayed as follows:

"2. That if any dispute or disagreement shall arise between the parties hereto, during the pendency of this suit and before a final decree herein, upon the question of what is a lawful or reasonable compensation to be paid by your orator to the defendant, for the transportation of express matter, your orator may be permitted to bring the same by way of interlocutory application to this Court for its decision, and that, pending the enquiry thereon, the preliminary injunction heretofore prayed, may be continued to the same purport, tenor and effect, as if the prayer for the same were here repeated.

3. That the said defendant may be decreed by this Court to transport at all times the express matter, safes and messengers of the said Southern Express Company, by the same trains and with the same accommodations thereon, and in its depots and stations, as it may transport its own express matter, or as it may accord to itself; and that the said defendant may be decreed so to transport said express matter, safes, and messengers of the said Southern Express Company, at and for the statutory tolls and compensation in that behalf by law provided, and that the said defendant may be decreed to make a reasonable rebate or reduction, to be fixed and determined by this Honorable Court, from its charges to the said Southern Express Company, by reason of its performance of said accessorial service, as above specified, so long as the said Southern Express Company shall offer to conform to all the reasonable rules and regulations of the said defendant, and to pay all lawful charges for the transaction of its said business."

The said two prayers were founded among other things upon the following allegations in said bill:

XLV.—And your orator further avers that the said railroad companies have classified railway freight according to law, and that the rates of toll or compensation therefor have been provided by law, and that the same cannot be lawfully exceeded by said defendant in its charges to your orator, or to the public whom your orator represents.

XLVI.—And your orator further avers, as it has hereinbefore averred, that it is now in the daily custom of making with its own horses and wagons which it now possesses, and under drivers for whose fidelity it is responsible, all the collections and deliveries of express freight as between the public and the railway lines of the said defendant, which the public cannot conveniently make on its own behalf, and that it does not require from the said defendant any similar service, nor, as it is advised and believes, can the said defendant lawfully charge it therefor.

XLVIII.—And your orator further avers * * * that it will be entitled to have all its express matter transported over the lines of the said defendant's railway at the rates of freight or toll specifically provided by law and by the charter of the said defendant and by the railroad commissioners, * * * and that in any event if the said defendant shall, during the pendency of this suit or hereafter, undertake to do and do its own express business, the said defendant can be legally required to deduct from the charges to be made by it to the public for the transportation of express matter upon all express matter transported by it for the said Southern Express Company, a just and reasonable compensation for the accessorial services rendered by

the said Southern Express Company beyond and off the lines of railway of the said defendant in the collection of goods from shippers or consignors and the delivery of goods to consignees by means of horses and wagons, and which accessorial service the said Southern Express Company does not require or need at the hands of the said defendant, but is now performing and rendering for itself, as is hereinbefore set forth.

XLIX.—This plaintiff further, in the event that the said defendant, during the pendency of this suit, undertakes to conduct, and does conduct for itself the express business over its said lines of railway * * * * is willing and ready, and hereby offers to pay all the reasonable freight or tolls which the said defendant railway company may lawfully demand for the transportation of express matter, as aforesaid.

V.—A temporary restraining order was granted on the filing of the bill on the 21st day of May, 1880, returnable on the 1st day of June, 1880, on which day, as appears by said transcript, the following order was made:

"The motion of the complainant for a preliminary injunction herein, according to the prayer of the bill, having been brought on to be heard, and the parties being present by their counsel, and the Court having duly considered the questions presented, after argument for the defendant as well as for the plaintiff, doth hereby order that the defendant, its officers, agents, servants, and employees, be enjoined and restrained, until the final determination of this cause, from preventing the plaintiff's enjoying the same facilities in the conduct of its express business permitted to any other express company, or exercised by the defendant itself, on payment by the plaintiff of reasonable compensation therefor."

VI.—The defendant duly answered said bill, and in such answer as set out in said transcript, stated, among other things, as follows:

"Defendant, as to the statements contained in paragraph 43 of complainant's bill, denies that it is the duty of the defendant to continue to afford to complainant, upon its passenger trains and at its depots and stations, the same facilities which it has heretofore accorded, or which it may hereafter accord to itself; denies that, under the laws of the State of Missouri, the defendant has no lawful power to arrogate to itself the exclusive right of conducting the express business over its lines of railway, or to exclude other express companies from participating therein, or to charge such other express companies such express rates as the said defendant may see fit to adopt. Denies that defend-

ant, by the laws of said State of Missouri, is compellable to receive all passengers and express freight from connecting or intersecting roads, whenever the same shall be delivered to it, and to take, transport and deliver the same without unnecessary delay, and for such charges and without any discrimination whether it shall transport such freight in its own name or in the name of another, and for such toll or compensation therefor as is specifically provided by law, or by the railroad commissioners appointed by law, and annually to transmit to said commissioners a report under oath showing, among other things, what express companies ran on its road, and on what terms and conditions, and the kind of business done by them.

27. As to the statements contained in paragraph 45 of complainant's bill, defendant admits that the railroad companies have classified railway freight, and that the rate of toll or compensation therefor has been provided by law, but denies that the same cannot be lawfully exceeded by the defendant in its charges to complainant or to the public. * * * * * *

30. As to the statements contained in paragraph 48 of complainant's bill, defendant denies that complainant is entitled to demand and receive from defendant the same facilities and accommodations for transacting the express business over the lines of defendant's railway, as may be accorded by said defendant to itself. Denies that it is entitled to have all its express matter transported over the lines of the defendant's railway at rates of freight or toll specifically provided by law, and by the charter of defendant, and by the said railroad commissioners, and upon the same trains, and with like accommodation thereon, and at depots and stations, as the defendant may accord to itself in the transportation of such express matter as it may carry. Denies that the defendant, in doing its own express business, can be lawfully required to deduct from the charges to be made by it to the public for the transportation of express matter, upon all express matter transported by it for the said Southern Express Company, a just and reasonable compensation for the accessorial service rendered by the Southern Express Company beyond and off the lines of railway of defendant, in the collection of goods from shippers or consignors, or the delivery of goods to consignees by means of horses and wagons.

31. Defendant states that under its charter of incorporation, which was duly granted under and pursuant to the laws of the State of Missouri, on the 3d day of March, 1851, it is authorized to transport passengers, goods, wares and merchandise of all kinds, and also all kinds of lumber, produce, and other articles usually transported on railroads, and to charge and receive such tolls and freights for transportation of persons and commodities on said road, or any parts thereof, as shall be to the interest of the same, and that the directors of the defendant are therein authorized to establish such tolls, and to alter the same from time to time.

32. Defendant further avers that, while it has always claimed the right under the provisions of its said charter to transport what is usually called express matter, and to do a general express business upon and over its own lines, for reasons satisfactory at the time it made the contracts set out in paragraphs 11 and 12 of complainant's bill, under and by virtue of which the said Adams Express Company, and the said Southern Express Company in its own right, and as the successor of said Adams Express Company, transacted the said express business over the lines of the defendant until about the first day of June, 1880, when the said contracts were terminated by notice duly given, in accordance with the terms and provisions of said contracts.

33. Defendant further avers that since the said first day of June, 1880, the defendants have formed and organized what is known as the "Express Department of the St. Louis, Iron Mountain and Southern Railway Company," and has been and is now doing a general express business on its own lines."

VII.—After the 1st day of June, 1880, on which the defendant so commenced to conduct the express business on its own behalf, and on which the preliminary injunction was so as aforesaid issued, the Southern Express Company continued under the protection of said order to conduct its express business over the defendant's line, and has since continued to conduct, and is now so engaged in conducting the same and in competition with the defendant express.

VIII.—Since the contract between the parties was so as aforesaid terminated, and the defendant commenced to conduct its own express business, no rate or other mode of compensation has been agreed upon or existed between the parties fixing or determining the quantum of compensation to be paid by the Southern Express Company for the facilities enjoyed by it.

IX.—A replication was duly filed to the answer and is contained in the transcript, and thereafter the parties severally proceeded to take the testimony set forth in the transcript, as aforesaid.

X.—Pending these proceedings, and as appears by the transcript, a dispute arose between the parties as to the privileges to be enjoyed by the Express Company under the

preliminary injunction, and as to the compensation to be paid therefor, which being called to the attention of the Circuit Court, it made on the 6th day of November, 1880, a further order, in these words:

"The petition of the plaintiff for a modification of the provisional order of injunction heretofore made having been presented to the Court, together with the answer thereto, and the affidavits and counter affidavits, and the respective solicitors having been fully heard in the premises, it is ordered that the provisional injunction heretofore made in this case be modified so that the same may read as follows:

The defendants, its agents, employees, and servants, are hereby enjoined, until the final determination of this suit, from preventing the plaintiff from enjoying equal facilities in the conduct of its express business with those permitted to other express companies, or exercised by the defendant itself with respect to said business, on payment by the plaintiff of reasonable compensation for such services as may be rendered in this behalf by the defendants. And it is further ordered that the defendant be enjoined from including, under the term 'reasonable compensation,' any accessorial charges, and from making any discrimination against the plaintiff for return of empty kegs or packages, and from charging the plaintiff higher rates of freight than are charged against other express companies, and than it exacts for the service of its own express department—the said rates as to the plaintiff not to exceed those now established by the defendant for like services of other parties, or for the conduct of its own express department. It is further ordered that the defendant be enjoined from preventing the transportation of express matter by the plaintiff over defendants roads, and from requiring, as a pre-requisite or condition for such transportation, the listing or disclosure by the plaintiff of the contents of the packages by the plaintiff presented to the defendant for transportation, and from preventing the messengers of the plaintiff, on payment of the passenger fare, from like accommodations for the care and custody of plaintiff's shipments, as are accorded to messengers of other express companies, or the agents, servants, or employees of the defendant engaged in like service."

XI.—The cause, in connection with other similar ones, was argued on the pleadings and proofs at St. Louis, on the 7th, 8th and 9th days of February, 1882, before the full Bench, composed of Associate Justice MILLER, MCCRARY, *C. J.*, and TREAT, *D. J.*

The opinion of the Court was pronounced on the 21st of February, 1882, by Mr. Justice MILLER, and is set out in the transcript in these words:

"IN THE CIRCUIT COURT OF THE UNITED STATES,

EIGHTH CIRCUIT.

WILLIAM B. DINSMORE, Pres. Adams Express Co., &c., *vs.* THE MISSOURI, KANSAS & TEXAS RAILWAY CO.	*District of Kansas.*
SAME *vs.* THE ATCHISON, TOPEKA & SANTA FE RAILROAD CO.	*District of Kansas.*
SAME *vs.* THE DENVER & RIO GRANDE RAILWAY COMPANY.	*District of Colorado.*
THE SOUTHERN EXPRESS CO. *vs.* THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.	*Eastern District of Missouri.*
THE SOUTHERN EXPRESS CO. *vs.* THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY.	*Eastern District of Arkansas.*

MILLER, *Circuit Justice:*

In these cases, argued before me at St. Louis, with Judges McCrary and Treat, I can do no more than present certain general conclusions

preliminary injunction, and as to the compensation to be paid therefor, which being called to the attention of the Circuit Court, it made on the 6th day of November, 1880, a further order, in these words:

"The petition of the plaintiff for a modification of the provisional order of injunction heretofore made having been presented to the Court, together with the answer thereto, and the affidavits and counter affidavits, and the respective solicitors having been fully heard in the premises, it is ordered that the provisional injunction heretofore made in this case be modified so that the same may read as follows:

The defendants, its agents, employees, and servants, are hereby enjoined, until the final determination of this suit, from preventing the plaintiff from enjoying equal facilities in the conduct of its express business with those permitted to other express companies, or exercised by the defendant itself with respect to said business, on payment by the plaintiff of reasonable compensation for such services as may be rendered in this behalf by the defendants. And it is further ordered that the defendant be enjoined from including, under the term 'reasonable compensation,' any accessorial charges, and from making any discrimination against the plaintiff for return of empty kegs or packages, and from charging the plaintiff higher rates of freight than are charged against other express companies, and than it exacts for the service of its own express department—the said rates as to the plaintiff not to exceed those now established by the defendant for like services of other parties, or for the conduct of its own express department. It is further ordered that the defendant be enjoined from preventing the transportation of express matter by the plaintiff over defendants roads, and from requiring, as a pre-requisite or condition for such transportation, the listing or disclosure by the plaintiff of the contents of the packages by the plaintiff presented to the defendant for transportation, and from preventing the messengers of the plaintiff, on payment of the passenger fare, from like accommodations for the care and custody of plaintiff's shipments, as are accorded to messengers of other express companies, or the agents, servants, or employees of the defendant engaged in like service."

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SAME *vs.* THE DENVER & RIO GRANDE RAILWAY COMPANY.	*District of Colorado.*
THE SOUTHERN EXPRESS CO. *vs.* THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.	*Eastern District of Missouri.*
THE SOUTHERN EXPRESS CO. *vs.* THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY.	*Eastern District of Arkansas.*

MILLER, *Circuit Justice:*

In these cases, argued before me at St. Louis, with Judges McCrary and Treat, I can do no more than present certain general conclusions

at which my mind has arrived in regard to the propositions argued by counsel:

1. I am of the opinion that what is known as the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized.

That while it is not possible to give a definition in terms which will embrace all the classes of articles so usually carried and to define it with precision by words of exclusion, the general character of the business is sufficiently known and recognized as to require the Court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads.

That the object of this express business is to carry small and valuable packages rapidly, in such a manner as not to subject them to the danger of loss and damage, which to a greater or less degree attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise and the like.

2. It has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent or messenger of the person or company engaged in it, and to refuse permission to this agent to accompany these packages on steamboats or railroads on which they are carried, and to deny them the right to the control of them while so carried, is destructive of the business and of the rights which the public have to the use of the railroads in this class of transportation.

3. I am of the opinion that when express matter is so confided to the charge of an agent or messenger, the railroad company is no longer liable to all the obligations of a common carrier, but that when loss or injury occurs, the liability depends upon the exercise of due care, skill and diligence on the part of the railroad company.

4. That under these circumstances, there does not exist on the part of the railroad company the right to open and inspect all packages so carried, especially when they have been duly closed or sealed up by their owners or by the express carrier.

5. I am of the opinion that it is the duty of every railroad company to provide such conveyance by special cars, or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business.

If the number of persons claiming the right to engage in this business at the same time, on the same road, should become oppressive, other considerations might prevail; but until such a state of affairs is

shown to be actually in existence in good faith, it is unnecessary to consider it.

6. This express matter and the person in charge of it should be carried by the railroad company at fair and reasonable rates of compensation; and where the parties concerned cannot agree upon what that is, it is a question for the Courts to decide.

7. I am of the opinion that a court of equity in a case properly made out has the authority to compel the railroad companies to carry this express matter, and to perform the duties in that respect which I have already indicated, and to make such orders and decrees, and to enforce them by the ordinary methods in use necessary to that end.

8. While I doubt the right of the Court to fix in advance the precise rates which the express companies shall pay and the railroad companies shall accept, I have no doubt of its right to compel the performance of the service by the railroad company, and after it is rendered, to ascertain the reasonable compensation and compel its payment.

9. To permit the railway company to fix upon a rate of compensation which is absolute, and insist upon the payment in advance or at the end of every train, would be to enable them to defeat the just rights of the express companies, to destroy their business, and would be a practical denial of justice.

10. To avoid this difficulty, I think that the Court can assume that the rates, or other mode of compensation heretofore existing between any such companies, are *prima facie* reasonable and just, and can require the parties to conform to it as the business progresses, with the right to either party to keep and present an account of the business to the Court at stated intervals, and claim an addition to, or rebate from, the amount so paid.

And to secure the railroad companies in any sum which may be thus found due them, a bond from the express company may be required in advance.

11. When no such arrangement has heretofore been in existence, it is competent for the Court to devise some mode of compensation to be paid as the business progresses, with like power of final revision on evidence, reference to master, &c.

12. I am of opinion that neither the statutes, nor constitutions of Arkansas or Missouri, were intended to affect the right asserted in these cases; nor do they present any obstacle to such decrees as may enforce the rights of the express companies."

XII.—On the same 21st day of February, 1882, as appears by the transcript, a further order was made by the Circuit Court in said cause in these words:

"IN THE CIRCUIT COURT OF THE UNITED STATES,

EIGHTH CIRCUIT—EASTERN DISTRICT OF MISSOURI.

THE SOUTHERN EXPRESS COMPANY

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

In this case it is ordered that the injunction hereinbefore granted shall remain in force until otherwise ordered by the Court. Counsel will be heard at a convenient time upon the question of the form of a decree to be entered herein in pursuance of the opinion of the Court announced by Mr. Justice Miller, and herewith filed.

GEO. W. McCRARY,

February 21, 1882. *Circuit Judge.*"

XIII.—The regular terms of the Circuit Court for the Eastern District of Missouri are appointed by law (*U. S. R. S., Sec.* 658) to be held at St. Louis on the third Mondays in March and September. The third Monday of March, 1882, occurred on the 20th day of March, 1882. The said Circuit Court convened on said designated day as appears by an entry in its records of which a certified copy is herewith filed, and which copy is in the words and figures following:

"Be it remembered that on the 20th day of March, 1882, the following appears of record in said Court, to wit:

March 20, 1882.

United States of America,
Eastern District of Missouri, } ss. :

IN THE CIRCUIT COURT OF THE UNITED STATES,

In and for the Eastern District of Missouri.

March Term, 1882.

Monday, March 20, 1882.

At a Circuit Court of the United States, in and for the Eastern District of Missouri, begun and holden at the City of St. Louis, in and for said District, on the third Monday, the twentieth day of March, 1882.

Present—Hon. George W. McCrary, Judge of the Circuit Court of the United States for the Eighth Judicial Circuit.
Hon. Samuel Treat, Judge of the District Court of the United States for the Eastern District of Missouri.
William H. Bliss, Esq., United States Attorney.
Felix Coste, Esq., United States Marshal ; and
M. M. Price, Clerk."

XIV.—At the said March Term, and on the 25th day of March, 1882. the said Circuit Court entered its decree in said cause, and which is the decree appealed from herein, and which, as appears by said transcript, was in the words following:

The Southern Express Company
vs.
The St. Louis, Iron Mountain and Southern Railway Company.

And now this day come the parties aforesaid, and by their counsel then and there present, bring on this cause to be heard on the pleadings and proofs, and the same were then and there presented to the Court, and the argument of counsel for the respective parties is heard, and the said cause is then and there submitted, and due deliberation having been thereupon had,

It is by the Court ordered, adjudged and decreed, as follows:

I.—That the express business, as fully described and shown in the record, is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, became known and recognized so as to require the Court to take notice of the same as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads.

II.—That it has become the law and usage, and is one of the necessities of the express business, that the property confided to an express company for transportation should be kept while in transit in the immediate charge of the messenger or agent of such express company.

III.—That to refuse permission to such messengers or agents to accompany such property on the steamboats or railroads on which is has to be carried, and to deny them the right to the custody of the property while so carried, would be destructive of the express business and of the rights which the public have to the use of such steamboats and railroads for the transportation of such property so under the control of such messengers or agents.

IV.—That the defendant, its officers, agents and servants have no right to open or inspect any of the packages or express matter which may be offered to it for transportation by the plaintiff's company, or to demand a knowledge of the contents thereof, nor to refuse transportation thereof unless such inspection be granted or such knowledge be afforded.

V.—That it is the duty of the defendant to carry the express matter of the plaintiff's company, and the messengers or agents in charge thereof, at a just and reasonable rate of compensation, and that such rate of compensation is to be found and established as a unit, and is to include as well the transportation of such messengers or agents as of the express matter in their custody and under their control.

VI.—That on and subsequent to the first day of April, 1878, the said defendant afforded to the said plaintiff all the facilities needed by it for the conduct of its express business over the defendant's lines, and such as were specifically provided for in the contracts in the bill herein set forth; that thereafter the defendant notified the plaintiff that such facilities would be withdrawn; and that it was the intention and purpose of the defendant to exclude the plaintiff's company from its lines on and after the 25th day of May, 1880; that such intention

and purpose were restrained by the preliminary injunction order of the Court, which said injunction order was afterwards modified, as appears in the record.

VII.—That it is the duty of the defendant to afford to the plaintiff all express facilities, and to the same extent, and upon the same trains that said defendant accord to itself or to any other company or corporation engaged in the conduct of an express business on the defendant's lines, and to afford the same facilities to plaintiff on all its passenger trains.

VIII.—That the plaintiff keep and render monthly a true account of the services performed for it by the defendant, and to pay therefor at the rate hereinafter specified on or before the 15th of each month after the date hereof for the business of the month preceding, and that the defendant has no right to require prepayment for said express facilities, or payment thereof at the end of every train or in any other manner than as is hereinafter provided ; and that plaintiff execute and deliver to the defendant a bond in the sum of one hundred and fifty thousand dollars ($150,000), conditioned well and faithfully to make such payments as is herein provided, and with surety to be approved by a Judge of the Court.

IX.—That it is and was the duty of the said defendant to afford and to have afforded such facilities to the plaintiff herein specified for a just and reasonable compensation.

X.—Whereas, it is alleged by complainant that since the commencement of this suit and the service of the preliminary order of injunction herein, the defendant has, in violation of said injunction and of the rights of complainant, made unjust discriminations against complainant, and has charged complainant unjust and unreasonable rates for carrying express matter, therefore it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, and for such order with respect thereto as the facts, when ascertained, may justify, and for the appointment of a Master to take proof and report thereon.

XI.—That the defendant, its officers, agents, servants and employees, and all persons acting under their authority, be, and they hereby are, permanently and perpetually enjoined and restrained from interfering with or disturbing in any manner the enjoyment by the plaintiff of the facilities provided for in this decree, to be accorded to it by the said defendant upon its lines of railway, or such as have been heretofore accorded to it for the transaction of the business of the plaintiff and of the express business of the public confided to its care, and from

interfering with any of the express matter or messengers of the plaintiff, and from excluding or ejecting any of its express matter or messengers from the depots, trains, cars or lines of the said defendant as the same are by this decree directed to be permitted to be enjoyed and occupied by the said plaintiff, and from refusing to receive and transport in like manner as the said defendant is now transporting, or as it may hereafter transport for itself or for any other express company over its lines of railway, the express matter and messengers of the said plaintiff, and from interfering with or disturbing the business of the said plaintiff in any way or manner whatsoever; the said plaintiff paying for the services performed for it by the defendant, monthly as herein prescribed, at a rate not exceeding fifty per centum more than its prescribed rates, for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account, or for any other express or other corporation, or for private individuals; reserving to either party a right at any time hereafter to apply to this Court, according to the rules in equity proceedings, for a modification of this decree as to the measure of compensation herein prescribed.

It is further ordered, adjudged and decreed, that the defendant pay the costs to be taxed herein, and that an execution or a fee bill issue therefor."

XV.—And on the 29th day of March, 1882, to wit, at the said March Term, the following further proceedings, as appears by said transcript, were had and appear of record in said cause:

"UNITED STATES CIRCUIT COURT,

FOR THE EASTERN DISTRICT OF MISSOURI.

SOUTHERN EXPRESS COMPANY

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Now comes the defendant by its solicitors, and objects and excepts to the decree entered in this cause, and each and every part thereof. And this defendant conceiving itself greatly aggrieved by this decree, and each and every part thereof, prays the Court to allow it an appeal therefrom to the Supreme Court of the United States, and that a full and complete transcript of the record in this cause, together with copies

of the proofs, and of such entries and papers on file as may be necessary on the appeal, be transmitted with all convenient despatch to the said Supreme Court.

THOS. J. PORTIS,
Solr. for Defendant.

March 29th, 1882.

I hereby certify that, in my opinion, there is good cause for appeal in the above stated cause.

THOS. J. PORTIS.

SOUTHERN EXPRESS COMPANY,
Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Defendant.

Now comes the defendant by its solicitors, and objecting and excepting to the decree entered herein, prays an appeal from the decree of this Court to the Supreme Court of the United States, and thereupon it is ordered that, on said defendant's filing a good and sufficient bond, in the sum of one thousand dollars, said appeal be allowed as prayed."

XVI.—And afterwards, to wit, on the 15th day of May, 1882, the following further proceedings as appears by said transcript were had and appear of record in said cause, to wit:

"SOUTHERN EXPRESS COMPANY,
Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Defendant.

Now comes the defendant by its solicitor, and presents to the Court its appeal bond herein in the sum of one thousand dollars, which is by the Court approved and ordered to be filed. It is further ordered that the Clerk of this Court make up a complete transcript of the record and proceedings in this cause and transmit the same to the Supreme Court of the United States on or before the second Monday of October next."

XVII.—At the same March Term of 1882, to wit, on the 3d day of June, 1882, the Express Company, as appears by the certified copy herewith filed, presented its petition to the said Circuit Court in the words and figures following, to wit:

"In the Circuit Court of the United States, Eastern District of Missouri.—In Equity—March Term, 1882.—The Southern Express Company, a corporation and a citizen of the State of Georgia, complainant, *vs.* The St. Louis, Iron Mountain and Southern Railway Company, a corporation and a citizen of the State of Missouri, defendant.

In the matter of the reference authorized by the decree of the Court in the above-mentioned cause, entered at the present Term of the Court, and on the 25th day of March, 1882.

To the Hon. Judges of the Circuit Court of the United States, for the Eastern District of Missouri. In Equity:

(1.) The said Southern Express Company, your petitioner, respectfully states, that it was, and is, the plaintiff in the above entitled cause, and filed its original bill therein on the 21st day of May, 1880.

(2.) That in and by said bill it averred and set forth its existence as a corporation and citizen of the State of Georgia, and the existence of the defendant as a corporation and a citizen of the State of Missouri, and that both said plaintiff and defendant were common carriers as particularly mentioned in said bill, which is here referred to as part of this petition.

(3.) That in said bill it was stated that plaintiff had, for several years previous to the filing thereof, enjoyed the privileges and franchises of its charter as an express carrier over the road of defendant, and desired a continuance of such enjoyment.

(4.) But that the said defendant had notified plaintiff that after May 26th, 1880, it should not continue its business on said road.

(5.) That afterwards, May 15th, 1880, the defendant notified your petitioner that it had "determined to transport all express matter and transact all express business over said road itself, and on its own account, and through and by its own officers and agents on and after the first day of June, 1880."

(6.) And said plaintiff, in its said bill, further stated it was informed and believed, that the said Railroad Company intended to exclude it and its express safes and messengers from said railroad, and refuse to accord to it, after said June 1st, 1880, any facilities or accommodations for its express business, and that such exclusion would take place unless restrained by order of the Court; and that if it did take place the plaintiff's business over said railroad would be not only irreparably injured, but absolutely destroyed; that its customers and patrons would be lost, its good will and investment rendered worthless, and its ability

to keep its contracts with other railway and express companies terminated, and its usefulness to the public, as its servant, destroyed.

(7.) That the plaintiff averred further in its said bill that it was its daily custom to make, with its own horses and wagons and drivers, for whose fidelity it was responsible, all the collections and deliveries of express freight as between the public and the railroad of defendant, which the public could not conveniently make on its behalf, and did not require from defendant, and for which the defendant had no lawful right to charge.

(8.) And said plaintiff further averred in its said bill, that it was lawfully entitled to demand and receive from defendant the same facilities and accommodations for transacting the express business over its lines, as might be accorded by defendant to itself, and to have its express matter transported by defendant at rates or tolls specifically provided by law and the charter of defendant and the Railroad Commissioners, and on the same trains and with like accommodations at the depots and stations, which defendant might accord to itself in the transportation of express matter by it, and for reasonable compensation. And in the event that defendant should, during the pendency of said suit, or afterwards, undertake to do an express business of its own, it should deduct from charges made by it for transportation of express matter for the plaintiff, a just and reasonable compensation for the accessorial service rendered by plaintiff beyond and off the lines of said railroad in the collection of goods from shippers or consignors, and delivering to consignees by means of horses and wagons, &c., and which service the plaintiff did not need or require to be done by defendant, but performed for itself. And said plaintiff offered in said bill to pay to defendant, lawful and reasonable rates in its business, and to comply with all reasonable rules of defendant in that behalf.

(9.) And in said bill the plaintiff prayed the Court to enjoin the defendant, its officers, agents, servants and employees, until the further order of the Court, from interfering with or disturbing the enjoyment by plaintiff of the facilities then accorded to it in the transaction of its business; from interfering with any of plaintiff's express matter or messengers; from excluding or ejecting any of its express matter or messengers from the depots, cars, or lines of defendant's road, then enjoyed and occupied by it; from refusing to receive and transport plaintiff's express matter and messengers, as it was then doing, and from disturbing the existing business relations between said plaintiff and defendant.

(10.) That on the hearing of the plaintiff's motion for a preliminary injunction therein, the Court, after argument for defendant as well as plaintiff, did then and there "order that the defendant, its officers, agents, servants and employees be enjoined and restrained until the final determination of said cause, from preventing the plain-

tiff's enjoying the same facilities in the conduct of its express business permitted to any other express company, or exercised by the defendant itself, on payment by plaintiff of reasonable compensation therefor." And defendant then and there had notice thereof.

(11.) That afterwards, on the 21st day of July, 1880, the said defendant filed its answer to said bill, and thereby denied that it was its duty to accord to plaintiff any facilities previously allowed to it on its passenger trains, or at its stations or depots, or such facilities as it accorded to itself; claimed an exclusive right in itself to do all express business over its road, and to exclude plaintiff and all other express carriers from its road, and a right to charge and collect any rate it saw fit; denied that it was bound to receive and transfer freights and passengers from connecting or intersecting railroads; denied that it was bound to make a reasonable deduction for service rendered by the plaintiff and not by itself, to shipments off of its road, from its charge against like shipments when it rendered the same service; and denied the right of plaintiff to have any space on its cars for carrying its express matter, or to carry such matter in the charge of plaintiff's employees, or to have its messengers ride in defendant's cars in charge of its express matter.

(12.) That afterwards, on the ——— day of ———— the plaintiff filed its general replication to said answer, and afterwards the said parties took and placed on file a large amonnt of testimony therein, both oral and written, to be read on the hearing thereof.

(13.) That, on November 6th, 1880, the Court, on the motion of plaintiff, modified the said preliminary injunction so as to read as follows (being the same order of the 6th of November, hereinbefore set forth).

(14.) Your petitioner further states that afterwards—viz.: March 25th, 1882—such proceedings were had in said cause that the same came on to be heard, and was heard, and thereupon the Court entered therein its decree, in the words and figures following, viz.: (being the same decree of the 25th March, 1882, hereinbefore set forth.)

All of which, among other things therein, reference being had to the record and proceedings in said cause, will more fully and at large appear.

(15.) Your petitioner now here respectfully prays the Court to grant to it the benefit of the reference authorized by Sections V. and X. of said decree so entered in said cause, March 25th, 1882.

(16.) Your petitioner respectfully states, that after the making of said orders of injunction by the Court, and notice thereof to the defendant, and during the pendency of said bill, the said defendant refused to carry any express matter of said plaintiff on its railroad cars and trains, at a just and reasonable or legal rate of compensation

therefor, but demanded and exacted from plaintiff, and required it to pay, as a condition precedent to such transportation, excessive, exorbitant, unreasonable and illegal rates; and plaintiff did pay such excessive, exorbitant, unreasonable and illegal rates, to its great wrong and injury.

(2.) That during the whole period last mentioned the said defendant refused to carry the plaintiff's messengers in charge of its express matter on its railway cars and trains at a just and reasonable or legal rate of compensation; but demanded and exacted from the plaintiff, and compelled plaintiff to pay, and plaintiff did pay, as a precedent condition to the transportation of such messengers in charge of plaintiff's express matter, excessive, exorbitant, unreasonable and illegal rates of compensation therefor, to its great wrong and injury.

(3.) That during the whole period aforesaid, the said defendant discriminated against the plaintiff in respect to its charges for transportation of the plaintiff's messengers in charge of its express matter on defendant's railway cars and trains, denying to plaintiff's messengers the same accommodations extended by it to its own messengers and to others, charging plaintiff for the transportation of its messengers as aforesaid, higher rates for transportation than it charged its own and others, and compelled plaintiff to pay the same as a precedent condition of such transportation, to its great wrong and injury.

(4.) That during the whole period aforesaid, the defendant unjustly discriminated against plaintiff in this: that it carried express matter for itself and others at less rates than it demanded from plaintiff, and compelled plaintiff to pay, for like service, to its great wrong and injury.

(5.) That during the whole period aforesaid, the said defendant unjustly discriminated against the plaintiff in this: that it included in its charges against plaintiff for transportation of its express matter, and compelled the plaintiff to pay to it, compensation for accessorial service to shipments of express matter off and beyond its railroad cars and trains, not rendered by defendant, but in fact rendered by plaintiff, and just as if defendant had rendered said service, to the great wrong and injury of the plaintiff.

(6.) Your petitioner states that from and after the——day of———, 1881, and down to March 25th, 1882, the defendant unjustly discriminated against the plaintiff in this; that it refused to allow plaintiff to do its express business over all its trains and express cars, and suffered the plaintiff to do its business only on some of its trains and express cars, thereby putting the plaintiff's express matter twelve hours or more behind the defendant's express matter and that forwarded by it for other persons, thereby driving plaintiff's customers away from it, destroying the good will and favor of the public for plaintiff, and in

so far destroying plaintiff's business, to the great wrong and injury of plaintiff.

(7.) That during the whole period from the granting of said injunction and notice thereof to defendant down to the 25th of March, 1882, defendant unjustly discriminated against the plaintiff in this: that it charged plaintiff, and compelled it to pay, as a precedent condition to transportation of its express matter, a greater amount on shipments for a less distance than it exacted and collected for the transportation of the same class and quantity of goods from plaintiff and others for a greater distance, and compelled the plaintiff to pay the said unreasonable and illegal charges, to its great wrong and injury.

(8.) That during the whole period last mentioned the said defendant unjustly discriminated against the plaintiff in this: that it charged plaintiff, and compelled it to pay, a greater amount as compensation for transportation of plaintiff's express matter over portions of its road, than it charged and compelled plaintiff and others to pay for transportation of similar quantities of the same class of express matter over other portions of its road of equal distance, to the great wrong and injury of plaintiff.

(9.) That said defendant, in all and each of the wrongs and injuries above mentioned, disobeyed and violated the injunctions of the Court in that behalf, in contempt of the authority of the Court and to the great wrong and injury of the plaintiff.

(10.) And in conformity to the terms of said decree, your petitioner respectfully prays that it be referred to a master in chancery to be appointed *pro hac vice* in this particular case, to investigate, examine and report to the Court as provided in said decree and by the rules of the Court, what is now and has been since the filing of the said plaintiff's bill, a reasonable rate of compensation to be paid to said defendant by plaintiff for transporting plaintiff's express matter, and messengers in custody and charge thereof, on the railway trains and cars of defendant, and affording to plaintiff all necessary and reasonable facilities and accommodations for conductng its business in that behalf; the same to be found and established as a unit, including transportation and accommodation for both the express freights and messengers of plaintiff, as aforesaid.

Also to investigate, examine and report, as aforesaid, as to the allegations of wrong and injury aforesaid, and for the purposes aforesaid to use all evidence taken heretofore in said cause and on file therein, both oral and written, and to re-examine the same witnesses, if necessary, and any other witnesses to be produced by the parties, and to conduct the proceedings before him at such times and places as he may designate; and to state an account of the express business conducted by plaintiff over defendant's lines from the filing of plaintiff's said bill to the 25th day of March, 1882; and what amount the plaintiff has

paid to the defendant on account of transportation of its express matter and messengers, and accommodations extended to it by defendant during the time last-named, and what amount, if any, has been paid to defendant in that behalf in excess of a reasonable and legal compensation therefor; and what damages the plaintiff has sustained by the wrongs and injuries as aforesaid alleged, and to report to the Court all the evidence received by the said Master, and all his actings and doings, and, as in duty bound, your petitioner will ever pray.

F. E. WHITFIELD,
GLOVER & SHEPLEY,
S. M. BRECKINRIDGE,
Solicitors for Plaintiff.

C. A. SEWARD,
Of Counsel.

In the Circuit Court of the United States, for the Eastern District of Missouri, In Equity, Southern Express Company, plaintiff, *v.* St. Louis, Iron Mountain and Southern Railway Company, respondent, United States of America, Eastern District of Missouri, sict.:

And now at this day comes Calvin H. Albright, who on his oath states that he was agent of the Southern Express Company for several years immediately preceding January 15, 1882, and since that time to the present time he has been route agent of said Southern Express Company and now is such route agent; that he has read the annexed petition of said Southern Express Company and on his own knowledge the statements in said petition are true in almost the whole scope and extent thereof, and that all said statements are true on information and belief of this affiant, and further saith not.

C. H. ALBRIGHT.

Subscribed and sworn to before me, this 15th day of May, 1882,

[L. S.] VIRGIL M. HARRIS,
Notary Public.

UNITED STATES OF AMERICA, *Eastern District of Missouri*, ss.:

I, M. M. PRICE, Clerk of the Circuit Court of the United States, in and for the Eastern District of Missouri, do hereby certify the writing hereto attached to be a true copy of petition for appointment of Master *pro hac vice* in case No. 1,667, of Southern Express Company, plaintiff, against St. Louis, Iron Mountain and Southern Railway Company,

defendant, as fully as the same remains on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix [L. S.] the seal of said Court, at office in the City of St. Louis, in said district, this 12th day of October, in the year of our Lord eighteen hundred and eighty-two.

M. M. PRICE,
Clerk of said Court.
By A. P. SELBY,
Deputy.

XVIII.—At the same March Term of 1882, to wit, on the 5th day of June, 1882, the Circuit Court modified the said decree of the 25th of March, 1882, as appears by a certified copy of such modification herewith filed, and which copy is in the words and figures following:

"UNITED STATES OF AMERICA, *Eastern District of Missouri*, } ss.:

IN THE CIRCUIT COURT OF THE UNITED STATES,

IN AND FOR THE EASTERN DISTRICT OF MISSOURI.

Be it remembered that on the 5th day of June, A. D. 1882, at a regular Stated Term of said Court, the following, among other proceedings, were had and appear of record, to wit:

SOUTHERN EXPRESS COMPANY,
Plaintiffs,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Defendants.

Now, at this day come the parties, and the petition of the plaintiff filed herein June 3d, 1882, having been fully considered by the Court, it is ordered that there be referred to George H. Shields, Esq., as

Master *pro hac vice*, to investigate, examine and report to the Court under said decree of March 25th, 1882, pursuant to the rules of the Court in such cases provided.

First.—What was, during the period between the injunction order herein of June 1st, 1880, and the 25th day of March, 1882, the rate actually enforced by the defendant against plaintiff for carrying its express freight over such portion of its line as the said plaintiff was allowed to send its express freight over, and what price in addition thereto, if any, it charged for the fares of messengers in charge of said freight, and state an account showing said rates and fares, between said dates, and the amount thereof, respectively.

Second.—What were the statutory rates for carriage of ordinary freights by said defendant during said period, and state an account of the same, as applied to the express freight transported by defendant for said plaintiff during said period, as if the same were ordinary freights.

Third.—What was, during the same period, a reasonable compensation to be paid by plaintiff to the defendant for allowing plaintiff all reasonable and proper facilities for conducting plaintiff's business over defendant's road, cars and lines; the same to be found as a unit, including compensation for the transportation both of plaintiff's express matter and messengers in the custody and control thereof; also what amount during the same period the plaintiff was required to pay, and has paid to the defendant in that behalf; and if the amount so paid by plaintiff has exceeded such reasonable compensation to state an account thereof.

Fourth.—Whether, during said period, defendant included in its charges for transportation of express matter for plaintiff, charges also for accessorial service not performed by said defendant but performed by plaintiff for itself. Under the term 'accessorial' service, as herein used, the Master will include only the costs and expenses of collecting and delivering express matter to the respective railroad depots or stations for transportation by defendant on its road and cars, and of delivering such express matter on the arrival of the same at the place of destination to the consignees thereof at any other place than at its depots or stations, respectively.

Fifth.—Whether, during the period aforesaid, the defendant required plaintiff to pay, and plaintiff paid, for transportation of its messengers in custody of its express matter other than usual passenger fares; and whether, during the same period, defendant has discriminated against plaintiff by transporting express messengers other than plaintiff's at less rates than it compelled plaintiff to pay, and if so, to state an account of the excess paid by plaintiff over either of said rates.

Sixth.—And whether, during the same period, defendant discriminated against plaintiff by charging and compelling plaintiff to pay for

transportation of its express matter higher rates and greater amounts than it charged others for the same and similar services; and if so, to state an account of the amount of money by means of such discrimination so paid or required to be paid by plaintiff above the rates so allowed to others than plaintiff for such service.

Seventh.—Whether, during the period aforesaid, the defendant discriminated against plaintiff by refusing to allow plaintiff to conduct its business on any of defendant's lines, trains and express cars in use during said period, on which defendants and others conducted express business while plaintiff was so excluded, and whether by such exclusion of plaintiff and its business its express matter and messengers were hindered and delayed, and plaintiff was thereby prevented from competing with defendant and others conducting express business over said lines; and if so, what damages, if any, were sustained by plaintiff in its business, and state an account thereof.

Eighth.—It is further ordered that, for the purposes of the reference hereby directed, the master is to use all evidence on file in this cause, and any other produced by the parties, and re-examine the same witnesses, if necessary, and any other witnesses produced by the parties, and conduct the proceedings before him at such times and places as he may designate, on due notice to the respective parties, and report his findings and all the evidence taken before him."

"UNITED STATES OF AMERICA, }
Eastern District of Missouri, } ss.:

I, M. M. PRICE, Clerk of the Circuit Court of the United States in and for the Eastern District of Missouri, do hereby certify the writing hereto attached to be a true copy, order of reference to master *pro hac vice* in case No. 1667, of Southern Express Company, plaintiff, against the St. Louis, Iron Mountain and Southern Railway Company, defendant, as fully as the same remains on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said Court at office, in the City of St. [L. S.] Louis, in said district, this 12th day of October in the year of our Lord eighteen hundred and eighty.

M. M. PRICE,
Clerk of said Court.
By A. P. SELBY,
Deputy."

XIX.—Thereafter and on the said 5th day of June, 1882, the said March Term of the said Court was, as appears by the certificate of the Clerk herewith filed, finally adjourned by an

entry on the record of said Court, as stated in said certificate, as follows:

"And afterwards, to wit, on the 5th day of June, 1882, the following appears of record in said Court, to wit:

Ordered, that Court be and it is now adjourned without day.

(Signed) SAMUEL TREAT.

UNITED STATES OF AMERICA, } ss.:
Eastern District of Missouri, }

I, M. M. PRICE, Clerk of the Circuit Court of the United States in and for the Eastern District of Missouri, do hereby certify the writing hereto attached to be a true copy of entries opening and closing the March Term, 1882, of said Court as fully as the same remain of record in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said Court at office, in the City of St. Louis, in said district, this 20th day of October in the year of our Lord eighteen hundred and eighty-two.

M. M. PRICE,
Clerk of said Court.
By A. P. SELBY,
Deputy."

Wherefore, your petitioner prays and respectfully moves the Court now here to dismiss the said appeal from the said decree of March 25, 1882, upon the following grounds:

1. This Court has no jurisdiction of such appeal.

2. The said decree was and is not final.

3. The said decree was and is interlocutory or provisional only.

4. The said decree does not decide all the issues between the parties, or those raised by the pleadings, and as to which the larger portion of the evidence aforesaid was addressed.

5. The said decree, on its face, leaves such issues pending and undetermined in the Circuit Court, which is proceeding to determine the same.

6. The appeal was taken before the end of the term at which such decree was pronounced.

7. Such decree was modified by the Circuit Court at the same term at which it was pronounced by a further interlocutory or provisional decree, under which proceedings are still pending in said Circuit Court.

8. The said decree was and is premature.

Your petitioner has caused copies of the foregoing motion, and of the notice of motion hereinunder given, and of your petitioner's brief in support thereof, which is hereto annexed, to be duly served according to the rules of this Court, upon the counsel in this Court for the appellant herein, and hereto annexes proof of such service.

And your petitioner prays for such other or further or different relief as to the Court may seem meet.

THE SOUTHERN EXPRESS COMPANY,
By HENRY B. PLANT,
President.

GLOVER & SHEPLEY,
S. M. BRECKINRIDGE,
F. E. WHITFIELD,
CLARENCE A. SEWARD,
Counsel for Petitioner.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

HENRY B. PLANT, being duly sworn, deposes and says: That he is the President of the Southern Express Company; that he has heard the foregoing petition read, and that the matters and things therein contained are true to his own knowledge, except as to the matters therein stated to be upon information and belief, and as to those matters he believes it to be true.

Sworn to before me, this }
day of November, 1882. }

JOSEPH GUTMAN, JR.,
[L. S.] *United States Commissioner*,
Southern District of New York.

UNITED STATES SUPREME COURT.

THE SOUTHERN EXPRESS COMPANY,
Appellee,
vs.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Appellant.
No. 914.

J. O. BROADHEAD, Esq., *of Counsel for Appellant.*
ST. LOUIS, Missouri.

SIR: You will please take notice, that on Monday, the day of December, 1882, a motion, of which a copy is hereto annexed, together with a petition, of which a copy is also hereto annexed, and a brief in support of said motion and of the prayer of said petition, of which brief a copy is also hereto annexed, will be presented to this Court at the opening of its session on that day, or as soon thereafter as counsel can be heard, and the said Court will then and there be asked on behalf of the appellee and upon the grounds in said motion and petition stated, and for the reasons in said brief assigned, to grant the said motion and the prayer of the said petition and to dismiss the appeal herein, and also to then and there accord to the appellee such other or further or different relief as to said Court may seem meet.

Dated November , 1882.

Yours respectfully,
GLOVER & SHEPLEY,
S. M. BRECKENRIDGE,
F. E. WHITFIELD,
CLARENCE A. SEWARD,
Of Counsel for Appellee.

UNITED STATES OF AMERICA,
Eastern District of Missouri, } ss.:

, being duly sworn, deposes and says, that on the day of November, 1882, he personally

served upon J. O. Broadhead, Esq., at the City of St. Louis, a copy of the foregoing motion and petition, as the same are hereinbefore printed, and also a copy of the brief hereto annexed, by delivering all such copies to and leaving the same with him personally.

Sworn to before me this
day of November, 1882.

U. S. Commissioner.

SUPREME COURT OF THE UNITED STATES.

THE SOUTHERN EXPRESS COMPANY,
Appellee,

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Appellant.

No. 914.

BRIEF FOR APPELLEE IN SUPPORT OF THE FOREGOING MOTION AND PETITION.

I.

An appeal is a matter of statutory right, and in Equity lies from final decrees only.

R. S., Sec. 692: "An appeal shall be allowed to the Supreme Court from all final decrees of any Circuit Court * * * in cases of equity * * * jurisdiction, where the matter in dispute, exclusive of costs, exceeds the sum of value of five (18 *Stats. at Large*, 315) thousand dollars, and the Supreme Court is required to receive, hear and determine such appeal."

This statutory appellate jurisdiction is all that has been conferred by Congress, and in its exercise the Court can proceed only in the manner which the law prescribes. (*Barry*

v. *Mercein*, 5 *How.*, 119; *Durasseau* v. *U. S.*, 6 *Cranch*, 314; *U. S.* v. *Curry*, 6 *How.*, 113; *Ex parte Vallandigham*, 1 *Wall.*, 251; *U. S.* v. *Young*, 94 U. S., 259.)

II.

Although the transcript was filed at this term only the appellee may now move to dismiss the appeal, and before the cause is reached in its regular order, if the decree appealed from was not a final one. This may be done in analogy to the practice of the Court, under which it entertains a motion to dismiss a writ of error before the return day thereof (*Clark* v. *Hancock*, 94 *U. S.*, 493).

Or, under the authority in relation to appeals in *Ex parte Russell* (13 *Wall.*, 671), in which the Court said:

"The case is virtually in the possession and subject to the control of this Court, as soon as the appeal is effectively taken, and we see no reason why the appellee should not at any time, when the Court is in session, apply to have the appeal dismissed, provided the question can be properly presented to the Court. Of course the Court would not hear the motion without having the record before it; but that could be procured and presented by the appellee, as is done where the appellant has failed to have the record filed in due time. Unless some unforeseen inconvenience should arise from the practice, we shall not refuse to hear a motion to dismiss before the term to which in regular course the record ought to be returned. It would be likely to prevent great delays and expense, and further the ends of justice."

III.

The Court will entertain a motion to dismiss an appeal before the record is printed, if the motion papers fully present the facts, and the Court is not required to inspect the transcript for the purpose of determining whether such facts

do or do not exist. *In National Bank* v. *Insurance Co.* (100 *U. S.*, 43), the Court said:

"The record has not been printed, and counsel do not agree as to what it contains. We will not decide motions to dismiss before the record is printed when there is any question about the facts on which the motion rests. In order to get a decision before printing, the motion papers must present the case in a way which will enable us to act understandingly without referring to the transcript on file."

This seems to clearly concede that if the motion papers do present the case and the facts upon which the motion is based, in such a manner as to enable the Court to act understandingly, the Court will entertain jurisdiction of a motion to dismiss before the record is printed.

There can be no dispute as to the facts upon which this motion is based. They all exist in the records of the Court below, and such records are all contained in the transcript, or in the certified copies which constitute the motion papers, and are all printed among such papers, so that there can be no disagreement as to what has transpired in the Circuit Court.

IV.

The fact that an appeal has been allowed by the Court below is of no weight in deciding the question whether such appeal was properly allowed. In *Callan* v. *May* (2 *Black*, 541), the Court said:

"It seemed to be supposed by counsel in the argument, that the order of the Judge of this Court, allowing the appeal, was conclusive and that its validity was not now open to dispute. But the allocatur of a Judge was never so considered. * * * A contrary doctrine would be exceedingly inconvenient, if it could be maintained, and would throw upon a single Judge the responsibility which properly belongs to the Court, and it does not, by any means, follow that the Judge who authorizes the appeal, has made up his own mind that the party is legally entitled to it. He may, and no doubt often does entertain doubt upon the subject, and in such cases he grants the appeal to bring the matter before the Court and enable it to decide for itself whether the case is or is not within their appellate jurisdiction, as regulated by the Act of Congress. The allocatur of a single Judge

certainly cannot enlarge the appellate powers of this Court beyond the limits prescribed by law."

V.

The facts upon which the motion is based are record facts. Part of these are contained in the transcript from which they have been extracted, and a part are contained in the certificates of the Clerk of the Circuit Court, which have been submitted. The enquiry now arises, can these certified copies from the record of the Circuit Court, which were made therein after the decree appealed from was pronounced, be regarded by this Court in determining the present motion?

In *Hodgkins* v. *Kemp.* (18 *How.*, 534), the Court said:

"Certificates or statements of the Clerk outside of the record, and given since it was certified and transmitted to this Court, have been filed as evidence of the irregularity of the removal. This evidence is not admissible upon the present motion. * * * * The motion is made to dismiss the case, not for any irregularity apparent in the record, but by testimony *aliunde*, offered to show that the transcript is incorrect. It is very clear that such testimony cannot be received to support this motion, and the record as it stands when the motion is made, presents the case which this Court is called upon to decide, and nothing outside of it can be introduced to affect the decision."

If, therefore, the certificates now submitted, were offered to impeach or impair the integrity of the transcript, it is clear that under this decision the Court could not regard them in disposing of the present motion. It is equally clear, however, that such certificates are not offered to impeach or impair the transcript, but simply to supplement it, so as to show to this Court that the decree appealed from was not considered by the Court below as final; that that Court claimed and exercised at the same term, subsequent jurisdiction over the decree, and lawfully modified it; and by so doing converted it, even if it had been a final decree, into an interlocutory one, which interlocutory decree became part of the original decree, and the whole is now in process of execution in the Court below.

This Court has always claimed the right and exercised the power of receiving evidence *aliunde*, and *dehors* the record

for the purpose of sustaining its jurisdiction, or of showing that, by reason of a fact occurring subsequently to the taking of a regular and proper appeal, it had lost jurisdiction of the same.

Thus in *Ex parte Bradstreet* (7 *Peters*, 634), the Court said:

"In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated, * * * the practice of this Court is to allow the value to be given in evidence. In pursuance of this practice, the demandant would have a right to give it in evidence in this Court."

In *Rush* v. *Parker* (5 *Cranch*, 287), the counsel asked time to show by affidavit the real value of the matter in dispute, and the time was granted.

In *Richmond* v. *Richmond* (21 *How.*, 391), the Court said:

"In such cases affidavits of value have been received here in order to show that the value is large enough to give jurisdiction to this Court."

In the *Grace Girdler* (6 *Wall.*, 441), which was an appeal in admiralty, the Court said:

"It is the practice of this Court, when it is claimed that the value in controversy gives jurisdiction, to allow an opportunity to make proof of the fact. An order will be made, therefore, allowing the appellants to make proof of jurisdictional value by affidavits, and to file such proof with the Clerk of the Court within twenty days."

So also in aid of its jurisdiction, and to defeat a motion to dismiss a writ of error for want of citation, the Court, in *Cook* v. *Moffatt* (5 *How.*, 295), said:

"The presumption is, that one was issued when the writ of error was allowed, and it may be proved *aliunde*."

So to sustain its jurisdiction and to defeat a motion to dismiss an appeal, upon the ground that no appeal bond was given, the Court, in *Anson* v. *Blue Ridge Co.* (23 *How.*, 1), gave the appellant sixty days to give the bond and file it with the Clerk.

So, on the contrary, is it the practice of the Court to receive evidence *aliunde* to show that its jurisdiction has been lost. This clearly appears from the decision in *Lord* v. *Veazie* (8 *How.*, 251), the head-note of which states the decision of the Court, as follows:

"Where it appears to this Court, from affidavits and other evidence filed by persons not parties to the suit, that there is no real dispute between the plaintiff and the defendant, but, on the contrary, that

their interest is one and the same, and is adverse to the interests of the parties who filed the affidavits, the judgment of the Circuit Court entered *pro forma*, is a nullity and void, and no writ of error will lie upon it, and it must therefore be dismissed."

In the case of *Cleveland* v. *Chamberlain* (1 *Black*, 419), a motion was made on affidavits filed in this Court to dismiss the appeal upon the ground that the appellant was the only party on record who had any interest in the cause either way —that he was conducting the appeal on both sides—and that strangers to the record would suffer from such decree as the appellant might procure. The Court said:

"This appeal must be dismissed * * * About a month after the decree was entered, the appellant became the equitable owner of the judgment, and the *dominus litis* on both sides. * * * This case came on to be argued on the transcript of the record, and it appearing to the Court here from affidavits and other evidence filed that this appeal is not conducted by parties having adverse interests, * * * it is ordered and adjudged that the appeal be and the same is hereby dismissed."

In *Wood Paper Company* v. *Heft* (8 Wall., 333), the bill was dismissed by the Court below. An appeal was taken to this Court. Pending the appeal, one Meech asked leave to intervene by counsel upon an allegation that, since the decree below, the case had been settled. Meech was allowed to intervene, and a commission was issued to take proofs in the matter, and these being before the Court, the motion to dismiss came on to be heard, and upon such proof, the motion to dismiss was granted.

In *United States* v. *Peggy* (1 *Cranch*, 103), the Court took judicial cognizance of a law passed after the judgment was rendered, and upon that fact set aside the judgment. It was argued that, if the judgment was correct, it could not be made otherwise by anything subsequent to its rendition. The head note states the substance of the decision of the Court, as follows:

"The Court is as much bound as the executive to take notice of a treaty, and will reverse the original decree of condemnation, although it was correct when made, and decree a restoration of the property under the treaty made since the original condemnation."

So also will the Court dismiss an appeal (*Portland* v. *United States*, 15 *Wall.*, 1) upon evidence *aliunde*, because the appellant had not filed a brief, and it will likewise dismiss an ap-

peal (*Selma* v. *Bank*, 4 *Otto*, 253), because the transcript was filed and the cause docketed without a bond to the clerk.

In *United States* v. *Ayres* (9 *Wall.*, 608), an appeal had been taken from a judgment of the Court of Claims. While the appeal was pending in this Court, a motion for a new trial was made in the Court of Claims, and a motion was made upon that ground to dismiss the appeal. The motion was denied. The Court of Claims granted the new trial, and the motion to dismiss the appeal was renewed upon that fact alone. The Court said:

"The petitioners obtained a judgment in the Court below against the Government, from which an appeal has been taken, and is pending in this Court. A new trial has since been granted by the Court below, and the payment of the judgment stayed. * * * It is quite clear that the order granting the new trial has the effect of vacating the former judgment, and to render it null and void, and the parties are left in the same situation as if no trial had ever taken place in the cause. This is the legal effect of a new trial by a Court competent to grant it. There is no reason, therefore, for continuing any longer the case on the docket. The motion to dismiss is granted."

In the *United States* v. *Crussell* (12 *Wall.*, 175), the United States moved to continue an appeal from the Court of Claims, founded upon the fact that evidence had been newly discovered on which a motion on behalf of the United States had been made for a new trial. The Court said:

"In the case of the *United States* vs. *Ayres* the Court denied a motion to dismiss an appeal from a judgment of the Court of Claims, when the motion was made upon the sole ground that a motion for a new trial had been made by the United States, and was pending in that Court, but afterwards dismissed the same appeal when a new trial had been granted. We are satisfied with the rulings then announced, and think that the spirit of it requires us to allow the continuance now asked for."

In *United States* v. *Young* (94 *U. S.*, 258), the same motion to dismiss was made, founded upon the same suggestion, to this Court that the Court of Claims had granted a new trial after the appeal had been taken and the record brought to this Court. The appeal was dismissed, the Court citing *U. S.* v. *Crussell* (12 *Wall.*, 175); *Ex parte Russell* (13 *id.*, 664), and *Ex parte United States* (16 *id.*, 699).

It is apparent from these decisions that there are cases in which the Court permits facts transpiring subsequently to

the appeal to be brought before it by evidence *aliunde*, and *dehors* the record, and that, when so brought, the Court will consider it and make such disposition of the appeal thereon as the justice of the case may require.

The contention of the appellee is two-fold:

First.—That the decree appealed from is, upon its face, not a final, but an interlocutory decree only.

Second.—That, if it was final, it was converted by the subsequent action of the Court below, at the same term, into an interlocutory decree. Whether such conversion did or did not take place is a question which can only arise, as in the cases cited of the appeals from the Court of Claims, by bringing to the attention of the Court evidence of what was done by the Court below, after the decree appealed from was pronounced. Though the appellee may be in error in its construction of what subsequently occurred in the Court below, that error cannot lead to the result that the evidence offered of such act must be rejected as *aliunde*, or as tending to impeach or impair the integrity of the transcript. If the appellee is right in its interpretation of the subsequent record facts, then the evidence of such facts is properly to be admitted to show that the jurisdictional element of finality in the decree appealed from has ceased to exist, and therefore that the appeal should be dismissed.

VI.

The decree below was not final.

1. It is elementary law that a decree relates back to the filing of the bill, and that it ought, if it be a final decree, to dispose, (1), of the issues raised by the pleadings; (2), of those created by the acts of the parties *pendente lite*.

2. There were two issues of law raised by the pleadings as originally framed: (1), Was it the public duty of the appellant to afford transportation and other needful facilities to the appellee, for the transportation of its express matter and messengers and the conduct of its business, whereby the private right of the appellee might be subserved? (2), If so,

what was "a fair and reasonable rate of compensation" (*Union Co.* v. *United States*, 104 *U. S.*, 667), to be paid by the appellee for such services by the appellant.

The first was a question of law *simpliciter*, depending upon those principles which were sustained by this Court in *Barton* v. *Barbour* (104 *U. S.*, 135).

The other was a question of law (*Union Co.* v. *United States*, *supra*), to "be determined upon a consideration of all facts material to the issue."

The prayers of the bill were directed specifically to the solution of this latter question, and sought a decision thereon as to what was "a fair and reasonable rate of compensation" to be paid by the appellee, if the public duty existed, from the date of the commencement of its suit.

The averments of the bill stated what, in the judgment of the appellee, was "a fair and reasonable rate of compensation," viz.:—a rate not in excess of classified railway freight rates as provided by law, not in excess of the rates prescribed by the Railroad Commissioners of the State, and not to include any compensation for the accessorial services rendered by the appellee off and beyond the railway lines of the appellant.

The answer of the defendant took issue upon the question of the fairness and reasonableness of the rates suggested in the bill, and denied any obligation on the part of the appellant to render the claimed services for either the statutory rates or those prescribed by the commissioners, or to make any deduction by reason of the accessorial service.

The bill further specifically prayed—looking forward to the pendency of the suit—that, if any dispute should arise pending the litigation as to what was a fair and reasonable compensation, the Court would adjudge that also.

By far the larger portion of the evidence in the voluminous transcript is addressed to the proper answer to be given to these prayers, and to the issues so joined. That such dispute did arise *pendente lite* is conclusively established by the decree appealed from, which states in its tenth paragraph the grounds thereof. That such evidence was so taken is conclusively established by the last paragraph of the modified decree of June 5, 1882, which, after referring the very issues raised by the pleadings and the acts of the parties, and hereinbefore stated, to a Master, authorizes the Master to use in his examination of the case "all evidence filed in this cause."

It is evident from the decree not only that it does not decide, but also that it was not intended to decide the second question of law between the parties, namely, what was a fair and reasonable rate of compensation to be paid by the appellee since the commencement of the suit? The decree on its face is prospective only, and purposely leaves the rate of compensation between June 21, 1880, and March 25, 1882, and down to this very day undecided. It provides an arbitrary rate for the future only, and as to that gives leave for a further day in Court. On such further day whatever rate, both for the past and the present, the Court below may adopt upon the coming in of the Master's report, will then be properly to be submitted to the Court below as the proper rate to be substituted by the Court for the future, instead of the rate now arbitrarily fixed.

The decree appealed from was founded upon the opinion of Mr. Justice MILLER. It is evident from that opinion that he did not intend to fix a final rate which should control the past, the present and the future, but only an arbitrary rate to be complied with until after due "consideration of all facts material to the issue," the Court should be prepared to prescribe what, "as a question of law," was the proper "rate of computation."

The opinion says:

"To permit the railroad company to fix upon a rate of compensation which is absolute, and insist upon the payment in advance or at the end of every train, would be to enable them to defeat the just rights of the express companies, to destroy their business, and would be a practical denial of justice. To avoid this difficulty, I think that the Court can assume that the rates or other mode of compensation heretofore existing between any such companies, are *prima facie* reasonable and just, and can require the parties to conform to it as the business progresses, with the right to either party to keep and present an account of the business to the Court at stated intervals, and claim an addition to, or rebate from, the amount so paid. When no such arrangement has heretofore been in existence, it is competent for the Court to devise some mode of compensation to be paid as the business progresses, with like power of *final revision on evidence, reference to Master, etc.*"

Inasmuch as the contracts between the railroad and the express company had been terminated, and as the railroad company had commenced to conduct an express business for itself, and which it has, since June 1, 1880, so conducted in competition with and in diminution of the business of the appellee, and as

the record in the Court below did not show that the parties had agreed as to the rates to be paid by the appellee, it is quite evident that the case presented fell within the contingency suggested by the opinion of the Court, "when no such arrangement has heretofore been in existence, it is competent for the Court to devise some mode of compensation to be paid as the business progresses, with like power of final revision on evidence, reference to a Master, etc."

The Court had decided the first question of law involved in favor of the appellee. As there had been no arrangement between the parties heretofore in existence as to the rate of compensation, it became necessary to suggest some method by which the benefit of the decision could be secured to the appellee. The opinion suggests how this could be done as an *ad interim* proceeding.

If the appellant had been content to permit the Court below to carry into effect, by its interlocutory decree, the suggestion of the opinion, there would have been no necessity for this motion. But it insisted upon having a decree upon the first question of law only, leaving the suggestion in the opinion, as to the methods to be pursued for obtaining the facts material to be considered in deciding the second question entirely unacted upon, and therefore leaving the case also but partially decided. It then hastened with its fragmentary appeal to this Court, upon the assumption that it would regard the decision of half the case as equivalent for the purposes of an appeal, to a final decision of the whole case. This the appellee claims to have been an error.

The decree appealed from does not purport to find, as a question of law or of fact, what is a fair and reasonable rate for the appellee to pay. All that it really decides upon this question is that a perpetual injunction issue restraining the appellant "from interfering with or disturbing the business of the said plaintiff in any way or manner whatsoever, the said plaintiff paying for the services performed for it by the defendant monthly, as herein prescribed, at a rate not exceeding fifty per centum more than its prescribed rates for the transportation of ordinary freight" * * * reserving to either party a right * * * hereafter to apply."

This was not the finding, as a matter of law, that fifty per cent. in advance of ordinary freight rates was a fair and reasonable compensation to be paid from the commencement of

the suit, but was simply the temporary carrying into effect the suggestion contained in the opinion that "it is competent for the Court to devise some mode of compensation to be paid as the business progresses, with like power of final revision on evidence, reference to a Master," etc.

Very much the same procedure took place in the case of *The Yuba* (4 *Blatch.*, 314). That was a libel to recover the amount of $9,240 due on a bottomry bond. The District Court gave a decree for $4,000, with interest and costs, with liberty to either party, within twenty days, to take an order of reference to a Commissioner, to ascertain and report the amount of the sums composing the bottomry, and what portions thereof had been previously a lien upon the vessel, with liberty to apply, &c. The libellant appealed to the Circuit, under the statute which authorized an appeal from a final decree.

NELSON, *J.*, said:

"It is manifest, from the form of the decree in this case, that it was not intended to be final. A gross sum is stated provisionally, subject to be modified by the Court on the coming in of the report of the Commissioner. * * * The $4,000 fixed seems to have been a formal sum, with a view to the reference and the ascertaining of specific data from which the proper amount might be inserted in the final decree. * * * The appeal must be dismissed."

That the rate inserted in the decree was intended to be arbitrary and provisional only, is further shown by the tenth paragraph of the decree, which was founded upon the second and third prayers of the bill, and in aid of the issues raised by the pleadings, and which was in the words following:

"X.—Whereas, it is alleged by complainant that since the commencement of this suit"—that is since the termination of the contract establishing the rate of compensation—"and the service of the preliminary order of injunction herein the defendant has, in violation of said injunction *and of the right of complainant*, made unjust discriminations against complainant, *and has charged complainant unjust and unreasonable rates for carrying express matter*, therefore it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, and for such order with respect thereto as the facts, when ascertained, may justify, and for the appointment of a Master to take proof and report thereon."

This was precisely the suggestion contained in the opinion, and the whole scheme therein prescribed ought, and but for the resistance of the appellant, would have been carried out

in the decree appealed from. If it had been so carried out this motion would have been without foundation. That the rate inserted in the decree appealed from was arbitrary and provisional only, and that the question what was a fair and reasonable rate of compensation was left wholly undetermined, is conclusively established by the first and third paragraphs of the modified decree of the 5th of June, 1882, which were as follows:

"*First.*—What was during the period between * * June 1, 1880"—the day when the defendant commenced to do its own express business—"and the 25th day of March, 1882, the rate actually enforced by the defendant against the plaintiff for carrying its express freight. * * * *Third.* What was during the same period a reasonable compensation to be paid by plaintiff to the defendant for allowing plaintiff all reasonable and proper facilities for conducting plaintiff's business over defendant's road, cars, and lines; the same to be found as a unit, including compensation for the transportation both of plaintiff's express matter and messengers in the custody and control thereof; also what amount during the same period the plaintiff was required to pay and has paid to the defendant in that behalf, and if the amount so paid by plaintiff has exceeded such reasonable compensation, to state an account thereof."

This was precisely in furtherance of the opinion, and in aid of a solution of the question of law still undecided—what is a fair and reasonable rate of compensation? The appellee claims that it has paid large sums in excess of a fair and reasonable compensation. If it has done so, the fund is held by the appellant in trust, and no decree can be considered as final which does not find the amount so held, and award restitution, and terminate the trust.

The fourth clause of the decree of June 5, 1882, requires the Master to ascertain what amount paid by the appellee has been for the accessorial service rendered by it. This was in aid of the issue, as to such service, raised by the pleadings.

It is quite evident that the rate of compensation is a vital question in the case and without a decision thereon the appellee cannot have the just benefit of the decree appealed from, which provides in its ninth paragraph.

"That it is and was the duty of the said defendant to afford and to have afforded such facilities to the plaintiff as herein specified for a just and reasonable compensation."

The appellee cannot have the full benefit of this decision

until the rate of compensation for the enjoyment of the facilities decreed is established. Therefore it is clear that the further action of the Court below is needed to enable the appellee to have the benefit of that which was decreed in the decree appealed from.

The question of what is a final judgment or a final decree has been frequently before the Court. It has decided that there can be no difficulty in determining when a judgment is final by applying to it the test of the right to issue execution thereon. If execution can be issued then the judgment is final.

In analogy to this it has also held that a decree of sale in a foreclosure suit was final for the purposes of an appeal, the reference to a Master to compute being considered as a step in aid of the execution only of the decree (*Ray* v. *Law*, 3 *Cranch*, 179; *Whiting* v. *Bank*, 13 *Peters*, 15; *Carr* v. *Hoxie*, *id.*, 460; *Bronson* v. *Railroad Co.*, 2 *Black*, 524; *Railroad Company* v. *Swasey*, 23 *Wall.*, 409.

In other cases, however, the Court has admitted that the question of what is a final decree in equity was a *questio vexata*, and not to be resolved without difficulty.

It would be profitless to examine in detail the long catena of authorities upon the question of what is and what is not a final judgment or decree, to be found in the cases of—

Young v. *Grundy*, 6 *Cranch*, 51.
Houston v. *Moore*, 3 *Wheat.*, 433.
Gibbons v. *Ogden*, 6 *id.*, 448.
The Palmyra, 10 *id.*, 502.
The Santa Maria, 10 *id.*, 444.
Chace v. *Vasquez*, 11 *id.*, 429.
Canter v. *Am. Co.*, 3 *Peters*, 318.
Brown v. *Swan*, 9 *id.*, 1.
Young v. *Smith*, 15 *id.*, 287.
Forgay v. *Conrad*, 6 *How.*, 201.
Perkins v. *Fourniquet*, 6 *id.*, 206.
Puliam v. *Christian*, 6 *id.*, 409.
Barnard v. *Gibson*, 7 *id.*, 650.
U. S. v. *Girault*, 11 *id.*, 32.
Fourniquet v. *Perkins*, 16 *id.*, 82.
Craighead v. *Wilson*, 18 *id.*, 200.
Beebe v. *Russell*, 19 *id.*, 283.
Farrelly v. *Woodfolk*, 19 *id.*, 288.

Humiston v. *Stamthorp*, 2 *Wall.*, 106.
Thompson v. *Bean*, 7 *id.*, 342.
Railway Co. v. *Swasey*, 23 *id.*, 409.

but a reference may be made to the language of the Court in a few of the cited cases.

In *The Palmyra* (*supra*), a decree of the Circuit Court awarded a restitution and for costs and damages, and the cause was brought by appeal to this Court. It was suggested by the Attorney-General for the appellants that, after the decree of restitution and for damages, there had been a reference to commissioners to ascertain the amount of damages, and, before the report of the commissioners had been acted upon by that Court the appeal was taken. The Court said:

"The decree of the Circuit Court was not final in the sense of the Act of Congress. The damages remain undisposed of, and an appeal may still lie upon that part of the decree awarding damages. The whole case is not, therefore, finally determined in the Circuit Court.

This case came up again (12 *Wheat.*, 1), where the Court said:

"It not appearing that there had been any final decree in the Circuit Court ascertaining the amount of damages the cause was dismissed. But at the last term, it being discovered that, in point of fact, there had been a final award of damages which was omitted by mistake in the transcript of the record, certified by the Clerk of the Court below, this Court, on motion of the appellant, orders the cause to be reinstated."

And it did this apparently without any *certiorari*, and on evidence of the fact *aliunde*, and it then affirmed the decree.

In *Chace* v. *Vasquez* (*supra*), which was a libel *in personam* for damages, a decree was taken for the libellants in the Circuit Court, and commissioners were ordered to be appointed to assess the damages. But the appeal was taken before the commissioners were appointed, upon the ground that no libel could be sustained *in personam* in such cases. It was argued that the sole inquiry was whether any libel *in personam* could be sustained, an objection that covered the whole libel and the entire decree, and that, if no libel could be sustained, an expensive and tedious investigation would be saved by first establishing the point that a libel *in personam* could not be sustained in such cases. The Court were of opinion that the

case was embraced by the principle decided in the case of *The Palmyra*, since an appeal would still lie from the damages, when ascertained, and the appeal was dismissed.

In *Brown* v. *Swain* (*supra*), a bill was filed in the Circuit Court to enjoin the collection of a judgment at law upon the ground of usury. There was a demurrer to the bill which was overruled, and an injunction was ordered perpetually restraining the defendant from collecting on the judgment more than $890.70, and reserving an inquiry as to whether the sum of $50 was due. The defendant prayed an appeal to this Court, which was granted. Under the decree and appeal the parties went on to take depositions with reference to the $50, and the Court again made the injunction perpetual beyond the said sum of $890.70. A motion was made to dismiss the appeal, on the ground that the decree appealed from was not final within the meaning of the law, and the facts transpiring subsequently to the taking of the appeal were brought before the Court, and are stated in the report. The appeal was dismissed, as having been granted before there was a final decree in the case.

In *Young* v. *Smith* (*supra*), a bill was filed by a residuary legatee to recover from the executors. A reference was had to a Master, who made his report that a certain sum was in the hands of the executors, exclusive of sundry uncollected debts then outstanding, some of which were good and some bad. The Court decreed that the report should be accepted, and that the complainants should have execution for the sum reported in the hands of the executors, and that the residue of the debts, when collected, should be paid into Court for distribution, under the direction of the Court. It was held that this was an interlocutory and not a final decree in the sense of the Act of Congress, and that an appeal from the same could not be taken. The Court said:

"We are of opinion that the decree is an interlocutory and not a final decree."

In *Forgay* v. *Conrad* (*supra*), the Court said:

"The decree not only decides the title to the property in dispute, and annuls the deeds under which the defendants claim, but also directs the property in dispute to be delivered to the complainant, and awards execution, and, according to the last paragraph of the decree, the bill is retained merely for the purpose of adjusting the accounts referred to the Master" (such accounts being of sundry sums of money which the complainant alleged had been received by one or more of the

defendants which belonged to the bankrupt estate at the time of its bankruptcy). "In all other respects the whole of the matters brought into controversy by the bill are finally disposed of as to all the defendants, and the bill as to them is no longer pending before the Court, and the decree which it passed could not have been afterwards reconsidered or modified in relation to the matters decided, except upon a petition for a rehearing within the time prescribed by the rules of this Court regulating proceedings in equity in the Circuit Court. * * * In limiting the right of appeal from final decrees, it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same Court, and to have the whole case and every matter in controversy in it decided in a single appeal. * * * The decree upon these matters might and ought to have awaited the Master's report, and when the accounts were before the Court, then every matter in dispute might have been adjudicated in one final decree, and if either party thought himself aggrieved, the whole matter would be brought up and decided in one appeal, and the object and policy of the Acts of Congress upon this subject carried into effect. These remarks are made in order to call attention to an inconvenient practice, and which is regarded by this Court as altogether inconsistent with the object and policy of the Act of Congress in relation to appeals, and at the same time needlessly burdensome and expensive to the parties concerned, and calculated by successive appeals to produce great and unreasonable delays in suits in Chancery."

In *Perkins* v. *Fourniquet* (*supra*), the Circuit Court decreed that the complainants were entitled to two-sevenths of certain property, and referred the matter to a Master in Chancery to take and report an account of it, and then reserved all other matters in controversy between the parties until the coming in of the Master's report. It was held that this was not such a final decree as could be appealed from to this Court. The Court said:

"This clearly is not a final decree in any respect. It is the common and ordinary interlocutory order or decree, passed by Courts of Chancery in cases of this kind, and it is absolutely necessary to prepare the case for a final hearing and final decree when the complainant is entitled to a partition of property or an account. For the principles upon which an account is to be stated by the Master, or a partition made, cannot be prescribed by the Court, until it first determines the rights of the parties by an interlocutory order or decree, and the case cannot proceed to a final hearing without it. And the appellant is not injured by denying him an appeal in this stage of the proceedings, because these interlocutory orders and decrees remain under the control of the Circuit Court, and subject to their revision, until the

Master's report comes in and is finally acted upon by the Court, and the whole of the matters in controversy between the parties disposed of by a final decree, and upon an appeal from that decree every matter in dispute will be open to the parties in this Court, and may all be heard and decided at the same time."

In *Pulliam* v. *Christian* (*supra*), the decree of the Circuit Court set aside a deed made by a bankrupt before his bankruptcy, directed the trustees under the deed to deliver over to the assignee in bankruptcy all the property remaining undisposed of in their hands, and to render an account before the Commissioner of the Court. In the argument of the cause on the question of jurisdiction it was said:

"The decree may be regarded as interlocutory in one sense—that is, as being made before the cause is finally ended and removed from the docket of the Court. But in respect to its own effect and operation, the decree is a final one, because it adjudges and determines the rights of the parties to the property in controversy, and all that remains now to be done is in execution of this decree. The finality of a decree does not depend upon its termination of the whole case, but upon its effect in settling the principles of the cause and adjudicating the rights of the parties to the subject in controversy. The decree in this cause performs all these functions. It settles all the principles of the cause. It adjudges the rights of all the parties, plaintiffs and defendants, to the subject; and it directs the defendants, who have the subject, to deliver it up to the plaintiffs. All that remains now to be done is simply in execution of that decree. Why should the parties be continued in expensive litigation in the Court below, as the consequence of the decree already pronounced, if that decree be erroneous, and when no such litigation and expense will be incurred if that decree be set aside, and a correct decree pronounced."

The Court said:

"This decree is final only as to the trust deed. All the matters arising under the trust are referred to a commissioner for a statement of the accounts to enable the Court to enter a final decree. There is no sale or change of the property ordered, which can operate injuriously to the parties. Under such circumstances, the decree not being final as to the whole matter in controversy, the appeal must be dismissed."

In *Barnard* v. *Gibson* (*supra*), the Circuit Court had made a decree sustaining the validity of a patent, and enjoining the defendant from infringing the same, and ordered a reference to ascertain and report the damages. An appeal was taken to this Court. It was argued in support of a motion to dismiss upon the ground that the

decree was not a final one, among other things, that it did not determine the amount of damages, nor adjudge them, nor settle any principles upon which they were to be computed, and that it did reserve a decision upon the rights of the respective parties, and did not give all the relief which was prayed for in the bill, and that whatever was asked and not granted was left undecided, because the bill was not dismissed as to that.

The Court said (when speaking of the case of *Forgay* v. *Conrad*, *supra*):

"The course of procedure in the Circuit Court was irregular, and the consequent injury to the defendants would have been irreparable. Effect should not be given to its final decrees by the Circuit Court, until the matters in controversy shall be so adjusted as to make the decree final. Any other course of proceeding will, in many cases, make the remedies by an appeal of no value. The decree in the case under consideration is not final within the decisions of this Court. The injunction prayed for was made perpetual, but there was a reference to a Master to ascertain the damages by reason of the infringement. The bill was not dismissed, nor was there a decree for costs. In several important particulars this decree falls below the rule of decision in *Forgay* v. *Conrad*. The bill was dismissed as to the principal matters in controversy, and there was a decree for costs."

And the appeal was dismissed.

In *United States* v. *Girault* (*supra*), the Court said:

"The practice in this Court, in case the judgment or decree is not final, is to dismiss the writ of error or appeal for want of jurisdiction, and to remand it to the Court below to be further proceeded in. This is also the rule in the King's Bench in England. It is there laid down in the second resolution that by the words in the writ, "*si judicium inde redditum sit*," &c., are intended not only a judgment in the chief matters in controversy, but also in the whole of them, so that the suit may be at an end. The reason given is that, if the record should be removed before the whole matter is determined in the Court below, there would be a denial of justice, as the King's Bench cannot proceed upon the matters not determined and upon which no judgment is given, and the whole record must be in the Common Pleas or King's Bench. It is entire, and cannot be in both courts at the same time. The writ is conditional, and does not authorize the Court below to send up the case, unless all the matters between all the parties to the record have been finally disposed of. The case is not to be sent up in fragments by a succession of writs of error."

The writ of error was dismissed, and the decision was affirmed in *Holcombe* v. *McKusick*, (20 *How.*, 552).

In *Craighead* v. *Wilson* (*supra*), the bill was filed in the Circuit Court by the complainants who claimed as heirs a part of the property of two deceased persons. The Circuit Court having ascertained the heirship of the claimants, and their relative rights in succession, referred the matter to a special Master to ascertain sundry facts in connection with the property. The Court said:

"The law intended that one appeal should settle the matter in controversy between the parties, and this would be the result in all cases when the appeal is taken on a final decree, unless it should be reversed or modified by this Court." The Court then referred to *Perkins* v. *Fourniquet* and *Pulliam* v. *Christian*, and said: "The above cases are sufficient to show the ground upon which appeals in Chancery are dismissed. To authorize an appeal, the decree must be final in all matters within the pleadings, so that an affirmance of the decree will end the suit. To apply this test in all cases cannot be difficult. In no legal sense of the term is the decree now before us a final one. The basis of the decree, embracing the equities in the bill is found, but the distribution among the parties in interest, depends upon the facts to be reported by the Master. Until the Court shall have acted upon this report, and sanctioned it, the decree is not final. There may be cases in which the attention of the Court has not been drawn to the character of the decree appealed from, but such an inadvertence cannot constitute an exception to the rule. The decision of the Court under the law establishes the rule which must govern in appeals from the Circuit Courts. The case of *Forgay* v. *Conrad* (6 *How.*, 201), was an appeal from an *interlocutory decree* which was sustained, though objected to; but this decision was made under the peculiar circumstances of that case. It will be observed that, if the defendants principally interested could not take an appeal until the return of the Master, their property under the decree would have been disposed of beyond the reach of the appellate Court, so that an appeal would be useless. This was the principal ground on which the appeal was sustained, although it was stated that this part of the decree was final."

In *Beebe* v. *Russell* (*supra*), the Court said:

"We feel very confident no case has been decided by it, this Court, when the question of the finality of a decree or judgment has been brought to its notice, in which the distinction between final and interlocutory decrees has not been regarded, as it was meant to be by the legislation of Congress, and as it was understood by the Courts of England and this country before Congress acted upon the subject. A decree is understood to be interlocutory, whenever an enquiry as to a

matter of law or fact is directed preparatory to a final decision. A decree final decides and disposes of the whole merits of the case, and reserves no further questions or directions for the future judgment of the Court so that it will not be necessary to bring the case again before the Court for its final decision. It is a final decree. It is true a decree may be final, although it directs a reference to a Master, if all the consequential directions depending upon the result of the Master's report are contained in the decree, so that no further decree will be necessary upon the confirmation of the report to give the parties the entire and full benefit of the previous decisions of the Court." (This last paragraph is a quotation from the head note in the case of *Mills* v. *Hoag*, 7 Paige, 18.) What the Chancellor said in that case was as follows: "The decree was final and not interlocutory, as it finally disposed of the subject of litigation so far as the Court was concerned. Chief Justice SAVAGE defines a final decree to be the last decree which is necessary to be entered to give the parties the full and entire benefit of the judgment of the Court. The decree in this case comes within that definition, as no further questions or directions are reserved for the future judgment of the Court, and although some further proceedings are to be had before a Master to carry into effect the decree, all the essential directions depending upon the result of those proceedings are given in the present decree." The Court, in *Beebe* v. *Russell*, continued—"The object of the law and the interpretation of it by this Court is to prevent a case from coming to it from the Courts below, in which the whole controversy has not been determined finally, and that the same may be done in this Court. We say, "in which the whole controversy has not been determined." Wherever it has been, and ministerial duties are only to be performed, though that be to ascertain an amount due, the decree is final. But the reference of the case to a Master, to take an account upon the evidence and from the examination of the parties and to make or not to make allowances affecting the rights of the parties, and to report his results to the Court, is not a final decree, because his report is subject to exceptions from either side, which must be brought to the notice of the Court before it can be available. It can only be made so by the Courts overruling the exceptions, or by an order confirming the report, with a final decree for its appropriation and payment. In *Forgay* v. *Conrad*, the decree given by the Court below was adjudged by this Court to be final, and to give this Court jurisdiction of it; but it was so upon the ground that the whole merits of the controversy between the parties had been determined, that the execution had been awarded, and that the case only been referred to a Master simply for the purpose of adjusting the accounts. The fact is, the order of the Court in that case referring it to a Master was peculiar, making it doubtful whether it could in any way control or qualify the antecedent

decree of the Court upon the whole merits of the controversy, or modify it in any way except upon a petition for a rehearing."

In *Farrelly* v. *Woodfolk* (*supra*), the bill was filed for the purpose of obtaining title to certain lands. The Court decreed that the defendants should procure the legal extinguishment of a lien and encumbrance which existed upon the lands, and convey them to the complainant. The decree also contained a reference to a Master with instructions. The defendants appealed. The Court said:

"This case having been submitted to the Court upon printed argument, we find from an examination of the records that the appeal has been prematurely taken from an interlocutory, and not from a final decree. The Master is directed to call for and examine on oath any of the parties to this suit, and to make a report to this Court. This is so obviously an interlocutory decree that we do not think it necessary to examine it in detail to show that a further and final decree is necessary to give to the complainant any of the advantages to which the Court, in its previous directions, has declared him to be entitled."

In *Thompson* v. *Dean* (*supra*), the decree directed that Dean, the defendant below and appellant here, forthwith to transfer upon the books of the Company certain shares of stock. It then directed further that an account be taken as to the amount paid and to be paid for the stock, and as to dividends accrued and to be credited under the contract between the parties. The Court said:

"In this case the decree directs the performance of a specific act, and requires that it be done forthwith. The effect of the act when done is to invest the transferee with all the rights of ownership. It changes the property in the stock as absolutely and as completely as could be done by execution on the decree for sale. * * * We think that the current of decisions fully sustains the rule laid down by the late Chief Justice in the case of *Forgay* v. *Conrad*, and which we again declare in his own language:"

"When the decree decides the right to the property in contest, and directs it to be delivered up to the complainant, or directs it to be sold, or directs money to be paid to the complainant, and the complainant is entitled to have the decree immediately carried into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this Court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the questions between the parties pursuant to the decree passed."

It is apparent from the drift of these decisions that it is the decree upon exceptions to the Master's report which is considered by this Court as final. But that this is so was more especially stated in *Fourniquet* v. *Perkins* (16 How., 82), in which the Court said:

"This case came before the Court some years ago on an appeal from an interlocutory order of the Circuit Court, which stated that the appellants were entitled to recover certain claims set out in their bill, and directed an account to be taken by a Master. The appeal was dismissed, and the cause was remanded to the Court below, with directions to proceed to a final decree. Upon receiving this mandate the Circuit Court proceeded to take the account upon the principles stated in its interlocutory order, and, when the report of the Master came in exceptions were taken to it on both sides. At the argument of these exceptions it appears that the Court reconsidered the opinion which it had expressed on the merits in the interlocutory order, and, believing that opinion to be incorrect, dismissed the complainant's bill. The case now before us is an appeal from that decree. The counsel for the appellants object to the decree of dismissal because it was made at the argument upon the exceptions to the Master's report, and as contrary to the opinion on the merits expressed by the Court in its interlocutory order. This objection cannot be maintained. The case was at final hearing at the argument upon the exceptions, and all previous interlocutory orders in relation to the merits were open for revision, and under the control of the Court. If the Court below, upon further revision or examination, changed its opinion after passing the order, it was its duty to correct the error."

This was reaffirmed in *Railroad Company* v. *Swazey* (23 *Wall.*, 409), in which the Court said:

"An appeal may be taken from a decree of foreclosure and sale when the rights of the parties have all been settled, and nothing remains to be done by the Court but to make the sale and to pay out the proceeds. This has long been settled. The sale in such a case is the execution of the decree. By means of it the rights of the parties as settled are enforced. But to justify such a sale without consent the amount due upon the debt must be determined, and the property to be sold ascertained and defined. Until this is done the rights of the parties are not all settled. Final process for the collection of money cannot issue until the amount to be paid or collected by the process, if not paid, has been adjudged. So, too, process for the sale of specific property cannot issue until the property to be sold has been judicially identified. Such adjudications require the action of the Court. A reference to a Master to ascertain and report the facts is not sufficient. A Master's report settles no right. Its office is to present the case to the Court in such a

manner that intelligent action may be there had, and it is this action by the Court, not the report, that finally determines the rights of the parties. With these well-settled principles as our guide, it is easy to see that the decree here appealed from is not final. The amount of the debt which the State must pay in order to stop the sale has not been determined."

In *Green* v. *Fisk* (103 *U. S.*, 518), the plaintiff in the Court below alleged that she was the owner of one-half of the property described, and prayed a partition. The Court decreed that she was the owner of one-half of the property, and referred it to a Master to proceed to partition according to law. An appeal was taken, and a motion made to dismiss.

The Court said:

"A decree cannot be said to be final until the Court has completed its adjudication of the cause. * * * The Master was in everything to proceed under the direction of the Court. He had no fixed duty to perform. He was the mere assistant of the Court, not in executing its process, but in completing its adjudication of the partition which was asked. There are still questions in which the parties have each a direct interest, and they must be determined judicially before the relief has been granted which the suit calls for. In foreclosure suits it has been held that a decree which settles all the rights of the parties and leaves nothing to be done but to make a sale and pay over the proceeds, is final for the purposes of an appeal. The reason is that in such a case the sale is the execution of the decree of the Court, and simply enforces the rights of the parties as finally adjudicated. Here, however, such is not the case, because still the Court must act judicially in making the partition it has ordered. What remains to be done is not ministerial, but judicial. The law has prescribed no fixed rules by which the officers of the Court are to be governed in the performance of the duty assigned to them. The Court is still to exercise its judicial discretion in directing the movements and approving the acts of its assistants, until it has finally settled and determined on the details of the partition if made in kind, or directed a sale by the ministerial officers, and prescribed the rules for a division of the proceeds. Appeal dismissed."

It is very clear, as has been already said, that the appellee cannot have the just and full benefit of the decree appealed from until the coming in of the Master's report. The decree declares it to be the duty of the appellant "to afford, and to have afforded, such facilities to the plaintiff as are herein specified for a just and reasonable compensation." This covers both the past and the present, and, if the Court below

should adopt the Master's report, it may apply it to the future also. But the Court does not decide what such just and reasonable compensation is. It refers that question to the Master upon the evidence already in, and authorizes him to report what was "a reasonable compensation to be paid by the plaintiffs to the defendant, together with the evidence." Until that report comes in the appellant cannot have the full benefit of the decree. The entire scheme, both of the decree appealed from and of the modified decree, looks to further action upon this vital question by the Court below ; and until that Court has settled the rate of compensation, including the disputed question of packed parcels, it has not finally decided the issues raised by the pleadings, or advised the appellee whether it can have any benefit at all from the decision in its favor upon the first question of law involved. The rate to be established by the Master and ultimately to be adopted, may be so onerous as to prevent the appellee from having any benefit whatever from the decree appealed from.

VII.

The policy of the law and the decisions of the Court are alike adverse to fragmentary appeals.

In *The Palmyra* (*supra*), the Court said:

"And we are of opinion that the cause cannot be divided so as to bring up successively distinct parts of it."

In *Canter* v. *Am. Ins. Co.* (3 *Peters*, 318), the Court said:

"It is of great importance to the due administration of justice, and is in furtherance of the manifest intention of the Legislature in giving appellate jurisdiction to this Court upon final decrees only, that causes should not come up here in fragments upon successive appeals. It would occasion very great delays and oppressive expenses."

In *Young* v. *Smith* (*supra*), the Court said:

"It is plain that it (the decree) does not dispose of the whole matter in controversy between the parties, and if an appeal could now lie upon the decree already rendered, an appeal could also lie from time to time from any future decree of distribution of any assets which might be collected after the former decree *toties quoties*, without any

final decision being made of all the matters in controversy. In our judgment this would be against the clear import and intention of the Acts of Congress, which were designed to give an appeal only from a decree final upon the whole matters and merits of the controversy."

In *Crosby* v. *Buchanan* (23 *Wall.*, 453), the Court said:

"Cases cannot be brought to this Court upon appeal in parcels. We must have the whole of a case or none. The Court below must settle all the merits before we can accept jurisdiction. Appeals will lie, as has been frequently held, when nothing remains to be done except to enforce and give effect to what has been decreed, but until all the rights of the parties have been finally passed upon and settled, this cannot be the condition of a cause. Nothing must be left below when an appeal is taken but to execute the decree."

The authorities cited clearly establish the right of a party to bring up on appeal the Master's report, the exceptions thereto and the rulings of the Court below thereon. If two appeals are not allowable, how can that be done in this case. It may well be assumed that both parties would like to be heard in this Court upon the rate of compensation and the value of the accessorial service. It may well be that both parties would like to be heard in this Court upon the question of overcharges and damages claimed by the appellee, and referred to the Master to decide. It was necessary for the appellee to make its claims in the Court below, as it did, otherwise it would have been adjudged to have waived them.

In *The Santa Maria* (10 *Wheat.*, 444), the Court said:

"Every existing claim which the party had omitted to make at the hearing upon the merits and before the final decree, is to be considered as waived by him, and is not to be entertained in any future proceedings; and, when a decree has been made which is in its own terms absolute, it is to be carried into effect according to those terms, and excludes all inquiry between the litigating parties as to liens or claims which might have been attached to it by the Court, if they had been previously brought to its notice."

If the parties would like to be heard in this Court upon the rate of compensation—including the question of packed parcels—the value of the accessorial service—the amount of overcharges—the amount of damages—and the amount of the trust fund—how, if successive appeals are not allowed, can they get a hearing in this Court?

It is true that there are suggestions in the authorities that a second appeal will lie, and there are cases in the reports

which show that a second appeal has been taken and has been entertained by this Court, but in this case the duties of the Master are in course of performance, and undoubtedly will be concluded and passed upon by the Court below long before the expiration of the four years which must probably elapse before this cause will be reached in its regular order by the Court. However much the parties may desire this Court to revise the action of the Master and the Court below, they cannot, if the decree appealed from be adjudged to be final, secure such revision. True, either might take a second appeal, but what would such second appeal bring up?

In *Supervisors* v. *Kennicott* (94 *U. S.*, 499) the Court said:

"Such subsequent appeal brings up for consideration only the proceedings of the Circuit Court after the mandate of this Court."

That is, if the decree appealed from be a final one, and this Court, four years from now, affirms it and sends its mandate to the Court below, and the Master has made his report, and exceptions have, within one month (Rule 83), been filed by the parties, and the Court below has passed thereon, both parties will be remediless.

It cannot be assumed that the Master will procrastinate the proceedings so that the proposed difficulty will not arise. Such a presumption requires too long an interval, and assumes that he will violate the provisions of Rule 75, which declares it to be his duty—

"to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the Court, or a Judge thereof, for an order to the Master to speed the proceedings and to make his report"

The possibility that both parties may be deprived of the right to an appeal from the decree upon the Master's report, ought not to be without weight in determining whether the decree appealed from is a final one.

VIII.

The decree appealed from finds its parallel in decrees in patent cases. Such decrees, under the authorities cited, are

not final until the Master's report comes in and is confirmed by the Court. The confirmatory decree is regarded as a final one, though as matter of fact it adds nothing to the interlocutory decree save that it adjudges the amount of damages or profits and awards execution therefor. When the interlocutory decree is for the plaintiff, it finds that the plaintiff is the owner of the legal right conferred by the patent; that the patent is valid; that the defendant has infringed; and awards a perpetual injunction and reference to a Master to compute the damages and profits. Such decree is not appealable, though it settles everything adversely to the defendant except the question of damages and profits. It would be very desirable for him to bring up the question immediately whether such injunction ought to have been granted. But this Court requires him to wait for the confirmatory decree before it will allow him an appeal to bring up that question. The hardship resulting from the injunction has not availed to persuade this Court that the interlocutory decree was a final one, although on an appeal the Court sometimes reverses the interlocutory judgment by dismissing the bill and thus terminating the injunction.

But the Court does not always award an absolute injunction. It sometimes finds the plaintiff's right under his patent, and that the patent is valid, and that the defendant has infringed, but from motives of public policy, or the peculiar equities of the case, it grants the injunction, only so long as the defendant shall see fit to refrain from paying a license fee or damages thereafter to be found or assessed by a Master, and which the Court adjudges to be a full compensation to the plaintiff, both prospectively and retrospectively. Such cases are illustrated by *Dorsey* v. *Marsh* (6 *Fisher*, 401); *Hodge* v. *Hudson Co.* (6 *Blatch.*, 172); *Howe* v. *Morton* (1 *Fisher*, 602); *Ballard* v. *Pittsburg* (12 *Fed. Rep.*, 786); *Am. Co.* v. *Glens Co.* (8 *Blatch.*, 533); and the list might be extended.

Suppose that the plaintiff insisted that his patent right was under the Constitution, the Revised Statutes, and the language of the grant an exclusive right to make, use and vend, and that the Court had no power against his will to make a decree by which the defendant could continue to use by paying a license fee, or damages to be assessed by a Master, and should thereupon bring his appeal from the decree giving the defendants the privilege of using to this Court, and ask it to reverse the decree, and to make the injunction perpetual, would this Court

entertain that appeal? Clearly not within the authorities cited. Those refused to entertain an appeal from the ordinary patent decree, not because the injunction had been made perpetual, but because there was an unsettled question arising on the pleadings and pending between the parties which it required the Court below to decide, so that the decision of this Court would finally dispose of the controversy.

In this case it is believed, from the opinion of the Court below, that it was the intention of the Court to adapt to this case the practice obtaining in patent cases, and to determine simply that the appellant should not enforce its threatened injunction of excluding the appellee so long as the appellee should be ready and willing to pay a fair and reasonable compensation for the privilege which it enjoyed. It said, in substance, to the appellant, "We do not think that the law permits you to destroy the appellee's business, and we refuse our assent to your so doing so long as the appellee is willing to pay a fair and reasonable compensation. That the business may proceed, we provisionally fix a sum for the appellee to pay, and under the tenth clause of our decree we send it to a Master to determine what are just and reasonable rates, or in other words, to determine whether what the appellee has been paying is unjust and unreasonable. On the coming in of the Master's report we will then hear you upon all the evidence already taken, and which we have not now examined, and upon all which the Master may report, and then finally determine what shall be the permanent rate of compensation to be finally fixed by the Court, and to apply since May 21, 1880."

This was all that the Court said. If, in the supposed patent case, the plaintiff could not appeal, for the reason given in the authorities cited, so, by a parity of reasoning, cannot the appellant successfully maintain that the decree of March 25, 1882, was the final decree in the cause, an appeal from which will be sustained by this Court.

IX.

The decree appealed from was pronounced at the March Term of the Circuit Court of 1882. Until the end of that term, that decree was under the complete and entire control of the Court, and subject to be reviewed or modified, and was not, therefore, to be regarded as absolutely final until the end of the term.

This was decided by the Court in *Railroad Co.* v. *Bradley* (7 *Wall.*, 575); *Bassett* v. *United States* (9 *Wall.*, 38); *Ex parte Lang* (18 *Wall.*, 167); *Bronson* v. *Shueten* (104 U. S., 415), in which the Court said:

"It is a general rule of law that all the judgments, decrees, or other orders of the Courts, however conclusive in their character, are under the control of the Court which pronounces them during the term at which they are rendered or entered of record, and that they may then be set aside, vacated, modified or annulled by that Court."

X.

The decree of the 5th of June, 1882, was made at the March Term of 1882. It purports upon its face to have been made "at a regular Stated Term of said Court." It was therefore a proceeding in Court and by the Court, as contra-distinguished from a Judge thereof. It was required to be made by the Court. Indeed it could not have been made by a Judge at Chambers, because the authority to act at Chambers would seem to be limited under Rule 3, to "proceedings preparatory to the hearing of the cause upon its merits."

The decree of the 5th of June, 1882, is therefore a decree of the Court below of equal dignity as the decree of March 25, 1882. The question now arises, what was its effect upon the decree appealed from?

XI.

The decree of the 5th of June, 1882, modified the decree of March 25, 1882, and is to be considered in legal effect as if engrafted thereon, and thereby the two decrees became one decree, and, if the decree of March 25th, 1882, was a final one, it ceased to be such after the 5th of June, 1882, and then became an interlocutory decree, pure and simple.

First.—The decree recites the title of the cause and thereby shows that the cause was still pending under its original number, No. 1667. It recites that it was made upon a petition which the silence of the defendant in not answering it admitted to be true.

It recites that "now at this day come the parties," by which it appears that the parties were then and still are in Court; and then it avers, "and the petition of the plaintiff filed herein June 3, 1882, having been fully considered by the Court, it is ordered," &c. By this it appears that the order was made upon a petition which had been deliberated upon by the Court.

The order then indissolubly connects itself with the decree of March 25, 1882, because it refers it to a Master in its own language, "to investigate, examine, and report to the Court under said decree of March 25, 1882." This, therefore, connects the decree of June 5, 1882, with the decree of March 25, 1882, in such manner that the two no longer remain separable.

The use of the word "said," in the quotation above given, confirms this. How did the "said" decree of March 25, 1882, get before the Circuit Court on the 5th of June, 1882, if that decree had been properly appealed from and was pending in this Court alone? How did the Court below get jurisdiction to entertain the petition and to proceed in the cause if the suit had been removed by a proper appeal? Obviously the Court below did not regard the decree of March 25, 1882, as final, or as withdrawn from its jurisdiction by an appeal. It obviously considered that it had rightful jurisdiction to proceed under said decree, and to effectuate the investigation which that decree left open.

The petition brought the fact before the Court that the March Term was still pending; for it said on its face, "In Equity, March Term, 1882."

It also brought before the Court the "said" decree, because it said:

"In the matter of the reference authorized by the decree of the Court in the above-mentioned cause, entered at the present term of the Court, and on the 25th day of March, 1882."

It recited the decree in full, and it then prayed as follows:

"Your petitioner now here respectfully prays the Court to grant to it the benefit of the reference authorized by Sections V. and X. of said decree, so entered in said cause March 25, 1882."

Section V. of the decree declared it to be the duty of the defendant to carry the express matter of the appellee and the messengers or agents in charge thereof at a just and reasonable rate of compensation, and that such rate was to be found and established as a unit, and was to include as well the transportation of messengers as of the express matter in their charge. That this unit rule was the correct one was decided by this Court in *Union Pacific Co.* v. *United States* (104 *U. S.*, 668), where the Court said, in reference to the claim by the Railroad Company for compensation for carrying the mails and the messengers in charge thereof, as follows:

"It will be just and necessary to include in that estimate and finding an allowance for compensation for the transportation of mail agents and clerks; not, however, as a separate item of service to be paid for necessarily at the rates which might reasonably be charged if that were the whole; but as a part of and incident to the entire service rendered in the transaction of the postal business required by the Government, for which as an entirety the compensation should be made at fair and reasonable rates."

Section X. of the decree of March 25, 1882, is the one already quoted, giving the plaintiff "leave to apply for an investigation," &c.

The Court below, therefore, had before it on the 5th of June, 1882, the petition which recited the substance of the bill and answer and thereby showed the issues raised as to rates and value of accessorial service, and the decree of March 25, 1882, and it then and there proceeded to make a further decree, which was called an order only in the same sense in which the decree in a patent cause appointing a Master is an order.

Second.—That the decree of the 5th of June, 1882, did operate to suspend and modify the decree of the 25th of March, 1882, and to terminate its finality, if it ever was final, is conclusively established by the case of *Brockett* v. *Brockett* (2 *How.*, 238), in which the Court said:

"A motion has been made to dismiss this appeal upon several grounds. * * * The next ground is that an appeal has been taken from the refusal of the Court below to open the former decree rendered for the appellant. It is plain that no appeal lies to this Court in such a matter, as it rests merely in the sound discretion of the Court below. And if this had been the sole appeal in the case, the appeal must have been dismissed. But an appeal has also been taken to the first decree, which was a final decree rendered by the Court. That decree was rendered on the 10th of May, 1843. During the same term a petition was filed by the defendant on the 26th day of the same month to have the final decree opened for certain purposes; and the Court took cognizance of the petition and referred it to a Master Commissioner. His report was made on the 9th of June following, the same term still continuing, and the Court then refused to open the final decree; and from this refusal, as well as from the final decree, the defendant took an appeal and gave bond with sufficient sureties on the 15th of the same month, and the appeal was then allowed by the Court. Now, the argument is that as the original final decree was rendered before the appeal, it could not operate as a supersede as or to stay execution on the decree, because to have such an effect the appeal should be made and the bond should be given within ten days after the final decree. But the short and conclusive answer to this objection is, that the final decree of the 10th of May was suspended by the subsequent action of the Court, and it did not take effect until the 9th of June; and the appeal was duly taken and the appeal bond given within ten days from this last period."

The decree of June 5, 1882, opened the decree of March 25, 1882, even if it had been final, to let in proof material to the issues and required for the further action of the Court, and until such action has been had there cannot be any final decree herein.

XII.

The appeal should be dismissed.

GLOVER & SHEPLEY,
S. M. BRECKINRIDGE,
CLARENCE A. SEWARD,
F. E. WHITFIELD,
Of Counsel for the Motion.

November, 1882.

OFFICE SUPREME COURT U.S.
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Supreme Court of the United States.

WILLIAM B. DINSMORE, AS PRESIDENT OF THE ADAMS EXPRESS COMPANY, AND A SHAREHOLDER THEREIN,

Appellee,

vs.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,

Appellant.

No. ~~994~~. 53

Motion to Dismiss Appeal, or for Certiorari,

AND

PETITION AND BRIEF

IN SUPPORT THEREOF.

CLARENCE A. SEWARD,
C. W. BLAIR,
F. E. WHITFIELD,
Of Counsel for the Motion.

NEW YORK:
DOUGLAS TAYLOR, BOOK AND LAW PRINTER, 89 NASSAU ST., COR. FULTON.
1882.

Supreme Court of the United States.

WILLIAM B. DINSMORE, AS PRESIDENT OF THE ADAMS EXPRESS COMPANY, AND A SHAREHOLDER THEREIN,

Appellee,

vs.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,

Appellant.

No. 994.

Motion to Dismiss Appeal, or for Certiorari,

AND

PETITION AND BRIEF

IN SUPPORT THEREOF.

CLARENCE A. SEWARD,
C. W. BLAIR,
F. E. WHITFIELD,
Of Counsel for the Motion.

NEW YORK:
DOUGLAS TAYLOR, BOOK AND LAW PRINTER, 89 NASSAU ST., COR. FULTON.
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Supreme Court of the United States.

WILLIAM B. DINSMORE, as President of the Adams Express Company, and a Shareholder therein, *Appellee*, *vs.* THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *Appellant.*	*No.* 994.

And now comes the appellee, and respectfully moves the Court, upon the petition hereto annexed, to dismiss the appeal herein, upon the following grounds:

I.—The certificate appended to the transcript is not the certificate required by law.

II.—1. This Court has no jurisdiction of such appeal.

2. The decree appealed from was and is not final.

3. The decree appealed from was and is interlocutory or provisional only.

4. The decree appealed from does not decide all the issues between the parties, or those raised by the pleadings, and as to which the larger portion of the evidence, which should have been contained in the transcript, was addressed.

5. The decree appealed from on its face leaves such issues pending and undetermined in the Circuit Court, which is proceeding to determine the same.

6. Such decree was modified by the Circuit Court at the same term at which it was pronounced by another interlo-

cutory or provisional decree, under which proceedings are still pending in said Circuit Court.

7. The said appeal was and is premature.

III.—And in the event that said motion should be denied, then that this Court would be pleased to grant a writ of certiorari to bring up the depositions, proofs, testimony and evidence on file in the Court below.

C. W. BLAIR,
F. E. WHITFIELD,
CLARENCE A. SEWARD,
Of Counsel for Motion.

SUPREME COURT OF THE UNITED STATES.

WILLIAM B. DINSMORE, as President of the Adams Express Company, and a Shareholder therein, *Appellee,* *vs.* THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *Appellant.*	*No.* 994.

To the Supreme Court of the United States:

The petition of William B. Dinsmore, as President and shareholder as aforesaid, appellee herein, respectfully represents:

I.—The transcript from the Clerk's Office of the Circuit Court of the United States for the District of Kansas, has been filed herein.

II.—It appears from the bill in such transcript that heretofore and prior to the 1st day of December, 1880, the Adams

Express Company had been and was then in the enjoyment of all the usual express facilities upon the defendant's railway, under a written contract in said bill set forth, wherein such facilites are particularly described, and wherein a stipulated compensation was nominated and agreed to be paid therefor.

III.—It in like manner further appears that on the 1st of December, 1880, the railway company notified the express company that such contract would be terminated on the 1st of January, 1881, and the railway company also then notified the express company that "it would be expected to retire from the operation of the express business on this road, as on and after that date the business will be done by and for the railroad company."

IV.—It in like manner further appears that the bill herein was filed on the 28th of December, 1880. It prayed, in substance, that the railway company might be restrained during the pendency of the suit, by a preliminary injunction, from interfering with or disturbing the business of the express company; from excluding or ejecting any of its express matter or messengers from the depots, cars, or lines of the said defendant, as the same had been theretofore enjoyed and occupied by the express company; and from refusing to receive and transport, in like manner as the defendant was then doing, such express matter and messengers, so long as the express company should be willing and ready, and offer to pay according to its present contract rates therefor, or such rates as should be equal to those paid by others who were afforded the same facilities, or for such compensation as should be equal to the cost thereof, and during the pendency of the suit not in excess of the contract price. The said bill also specifically prayed as follows:

"2. That the said defendant may be adjudged and decreed to receive for transportation the express matter and messengers of the Adams Express Company at all its depots and stations, and to transport the same to destination, without molestation or hindrance, upon the same terms as to compensation for freight or passage money, and by the same train that it receives and transports express matter and messengers for the Pacific or any other express company, and that it may be adjudged and decreed that the said defendant has no lawful right to make any contract of any kind with any person, firm, or cor-

poration, whereby it shall grant any rights, privileges, accommodations, or facilities over its lines of railway, which will prevent, or which may or can be alleged to prevent the said defendant from granting the same or equal rights, privileges, accommodations and facilities to the Adams Express Company, or to any other portion of the public desiring to have, occupy, enjoy, and possess the same, upon the same and equal terms as are offered by or afforded to any other person, firm, or corporation.

"3. That the said defendant may be adjudged by this Court to transport at all times the express matter and messengers of the said Adams Express Company by the same trains and with the same accommodations thereon, and in its depots and stations, as it may transport its own express matter, or that it may accord to itself, and that the said defendant may be decreed to transport the said express matter of the Adams Express Company at and for a rate of compensation not in excess of the amount which it shall cost the said defendant so to transport the same, and to continue to accord the facilities aforesaid, and not in excess of the lawful freights and tolls which the said defendant may be authorized to charge, and that the said defendant may be decreed to make a reasonable rebate or reduction therefrom, to be fixed and determined by this Honorable Court, by reason of the performance by the said Adams Express Company of said accessorial service as above specified."

The said two prayers were founded, among other things, upon the following allegations in said bill:

"XXVIII.—As this plaintiff is informed and believes, the said Jay Gould, by whom said notice of the 1st of December, 1880, is signed, as the president of the said defendant, is also largely interested in the ownership and management of a number of other railways, which in the aggregate are popularly known as "The Wabash System," and that all of the railways comprised in said system have granted to the Pacific Express Company, a corporation created according to the laws of the State of Nebraska, all needful railway facilities for the conduct of the express business over the lines of railway embraced in such system, and which said Pacific Express Company is now daily engaged in the conduct of the express business on such lines.

XXXII.—This plaintiff further says, upon information and belief, that it is the intention of the said defendant to accord to the said Pacific Express Company on the 1st day of January, 1881, the sole and exclusive enjoyment of the facilities on its line, and needed for the conduct of the express business thereon, and such as have been heretofore accorded under the said contract, and by the usage and custom of the defendant thereunder, to the said Adams Express Company.

XXXIII.—This plaintiff further says, that if it is not the intention of the said defendant so to accord such facilities to the said Pacific Express Company, then that it is the intention and purpose of the said defendant to exclude and eject the said Adams Express Company from the cars, lines, depots, and stations of the said defendant on and after the 1st day of January, 1881, and thereafter to undertake the exclusive conduct of the express business on its own behalf and in its own name, and to refuse to recognize any right of the Adams Express Company to have and enjoy a continuation of the express facilities heretofore accorded to it, and to exclude it from any participation therein.

XXXV.—The plaintiff further says, as he is advised and believes, and therefore charges, that the said exclusive contract between the said defendant and the said Pacific Express Company, if made, is, or if about to be made will be, violative of the duties and obligations of the said defendant; inconsistent with the rights of the public; will prevent lawful competition in business; will be in restraint of trade, and will create a monopoly, and will be void at the common law; and constitutes no legal or reasonable ground for the threatened exclusion and ejectment of the Adams Express Company from the railway lines of the said defendant.

XXXVI.—This plaintiff further avers, as he is informed and believes, that if the said defendant undertakes, on and after the 1st day of January, 1881, to conduct the express business as such business has been practically defined by the demands of the public in relation thereto, it will so undertake the same without lawful or charter authority therefor, and without legal right to a monopoly thereof, or to the sole and exclusive enjoyment of its railway facilities in the conduct thereof, and that in such event the said Adams Express Company will still have, as representing the public as aforesaid, legal rights in the premises to be protected by this Court, by its decree to be made herein, and that it will be entitled to demand and to receive from the said defendant, and at a compensation not exceeding the cost thereof to it, the same facilities and accommodations for transacting the express business over the lines of the said defendant's railway as may be accorded by the said defendant to itself, and that it will be entitled to have all its express matter transported over the lines of the said defendant's railway on the payment of the cost of such transportation, or at such rates for freight or toll as may be just and reasonable and not in excess of those authorized by law, and upon the same trains, and with like accommodation thereon, and at depots and stations, as the said defendant may accord to itself in the transportation of such express matter as it may carry, and with a reasonable deduction therefrom as a just compensation for the accessorial service rendered by the said Adams Express Company on, beyond and off the lines of the said de-

fendant, in the collection of express matter from shippers or consignors, and the delivery of the same to consignees, and the custody thereof, by means of messengers, horses, and wagons, as is hereinbefore set forth, and which accessorial service the said Adams Express Company does not need or require at the hands of the said defendant, but is now performing and rendering for itself, as hereinbefore set forth.

XXXVII.—This plaintiff further, in the event that the said defendant, during the pendency of this suit, undertakes to conduct, and does conduct for itself, the express business over its said lines of railway, hereby offers to comply with all the proper rules and regulations of the said defendant in reference to the conduct of said business, and is willing and ready, and hereby offers to pay all the reasonable compensation, freight, or toll which the said defendant railway company may lawfully demand for the transportation of express matter and the continuation of the needful railway facilities as aforesaid therefor."

V.—A temporary restraining order was granted on the filing of the bill on the 28th day of December, 1880, which came on to be heard on the 15th and 16th days of March, 1881, on which day, as appears by said transcript, the following order was made:

"And upon the 15th day of March, 1881, being the return day of the rule herein as entered and continued, parties appeared by their respective counsel, the complainant being represented by C. A. Seward and C. W. Blair, and the defendant being represented by T. J. Portis and A. L. Williams, and a motion for an injunction *pendente lite* was heard upon the bill and answer, with affidavits and additional affidavits, read both by complainant and defendant, and same was argued by counsel, which argument extended into the 16th day of March, 1881. The Court having heard said affidavits, and argument of counsel, is of opinion that the motion for said injunction should be granted, and the Court doth therefore order that the defendant herein, its officers, agents, servants and employes, and all persons acting under or by virtue of its authority, be and the same are hereby enjoined and restrained until the final hearing of this cause from interfering with or disturbing in any manner the enjoyment by the Adams Express Company of the facilities now accorded to it by the defendant herein, upon its lines of railway and the extensions thereof, for the transaction of the business of the said Adams Express Company, and of the express business of the public confided to its care, and from excluding or ejecting any of its express matter or messengers from the depots, cars or lines of the said defendant, as the same have been heretofore and are now enjoyed and occupied by the said Adams Express Company, and

from refusing to receive and transport in like manner as the said defendant is now doing, and has heretofore done over its lines of railway, the express matter and messengers of the said Adams Express Company, and from interfering with or disturbing the business of the said Adams Express Company or its present relations in reference thereto with the said defendant in any way or manner whatsoever, so long as said Adams Express Company shall be willing and ready, or shall offer to pay according to its present rates with the defendant.

It is further ordered, that the plaintiff pay to the defendant for its services the same compensation as is now paid until the next term of this Court, subject to a reconsideration or readjustment of such compensation at said term, to relate back to the date of the original restraining order herein, or the date of this order, as the Court may then direct. It is further ordered, that the complainant is not to carry express freight at rates less than fifty per cent. above the rates of the regular freight traffic of the defendant, provided that the complainant shall not be required to charge higher rates than any other express company doing business on defendant's road. And it is further ordered, that a writ of injunction issue herein to the defendant to carry the foregoing order into execution."

VI.—The defendant duly answered said bill on the 15th day of March, 1881, and in such answer, as set out in said transcript, stated, among other things, as follows:

"That the said Adams Express Company has not always paid and does not now pay to the common carriers whom it employs a just and reasonable compensation satisfactory to them for the facilities afforded, and especially it has not paid and does not now pay this defendant a reasonable compensation for the facilities afforded by it to said Adams Express Company. * * * And defendant, further answering, avers and says, that it denies that the compensation paid by the said Adams Express Company in the said contract specified was nominated and prescribed by this defendant, as a just and reasonable compensation to be demanded and received by it, and avers the truth to be that such compensation was nominated by both parties hereto as set forth in said contract, and that this defendant was compelled to accept the terms of said contract, whether reasonable or not, because of the monopoly of the express business by said plaintiff in the territory reached by this defendant, whereby it was enabled to dictate its own terms. * * * This defendant, further answering, denies that it is the intention of the said defendant to accord to said Pacific Express Company on the 1st day of June, 1881, the sole and exclusive enjoyment of the facilities on its lines, and needed for the conduct of the express business thereon, and such as have heretofore been accorded under

the said contract, and by the usage and custom of the defendant thereunder to the said Adams Express Company or to eject the said Adams Express Company therefrom * * * On the 31st day of January, A. D. 1881, A. A. Talmadge, as general manager of the road of this defendant, in the name of this defendant, made and executed to and with the said Pacific Express Company, the following contracts: [a copy of the two contracts are then set out—the first agrees to pay for express facilities on the defendant's line between Sedalia, Missouri, and Dennison, Texas, and between Parsons, Kansas, and Junction City, Kansas, $225 per day, and one-half passenger fare for its agents or messengers in charge of its express matter; the second agrees to pay for express facilities on the defendant's lines between Hannibal, Missouri, and Sedalia, Missouri, $40 per day, and one-half passenger fare for agents or messengers in charge of its express matter.] * * * The defendant, further answering, denies that the said Adams Express Company * * will be entitled to demand and receive from the said defendant, and at a compensation not exceeding the cost thereof to it, the same facilities and accommodations for transacting the express business over the lines of the said defendant's railway as may be accorded by the said defendant to itself, and that it will be entitled to have all its express matter transported over the lines of the said defendant's railway on the payment of the cost of such transportation, or at such rates for freight or toll as may be just and reasonable, and not in excess of those authorized by law, * * * and with a reasonable deduction therefrom as a just and reasonable compensation for the accessorial service rendered by the said Adams Express Company on, beyond, and off the lines of the said defendant. * * * On the contrary thereof, this defendant distinctly asserts that it has a right under its charter to conduct and carry on the express business as defined in said bill, and to exclude any and all rival companies from the enjoyments of its property, rights and franchises of which it is the exclusive owner, for which it has paid large sums of money, and which it is not required by law to divide with any other rival company. * * * Defendant further answering, avers that the contract which it entered into with said Adams Express Company, set forth in said plaintiff's bill was unjust and unreasonable, and it was defendant's duty to the public as well as to itself to terminate it; and defendant avers that, with due and proper regard to the interests of the public, it made and entered into the contract with the Pacific Express Company hereinbefore set forth, which contract was and is more just and remunerative to this defendant than the said contract with the said Adams Express Company, and that the compensation agreed to be paid to this defendant by the said Pacific Express Company was just and reasonable, and ought

to be paid by any express company doing business over this defendant's line of road. * * * That said contract is just and equitable, and will serve to emancipate this defendant and the public along the line of the defendant's road from the unjust, oppressive and illegal monopoly which the said Adams Express Company has heretofore enjoyed upon said defendant's line of road * * * And defendant avers that said contract with the Pacific Express Company is reasonable, legal and just."

VII.—On the 15th day of April, 1881, the plaintiff filed a supplemental bill which is set out in said transcript, and which was in the words and figures following:

"WILLIAM B. DINSMORE, as President of the Adams Express Company, and a shareholder therein,

vs.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

WILLIAM B. DINSMORE, a citizen of the State of New York, and a resident therein, as the President of the Adams Express Company, and a shareholder therein, brings this his supplemental bill of complaint, against the Missouri, Kansas and Texas Railway Company, a corporation created according to the laws of the State of Kansas, and owning and operating a line of railway as a public highway within said State, and thereupon your orator complains and says:

I.—Since the filing of the original bill herein, and which was so filed on or about the 27th day of December, 1880, and the service upon the said defendant of the subpœna herein, certain other and further facts have transpired, which this plaintiff is advised and believes that it is necessary, right and proper should be brought before this Court, by way of supplemental bill, or by way of supplement to the original bill herein; and he therefore prays leave to file this either as a supplemental bill, or as a supplement to said original bill, under and pursuant to the rules and practice in such case made and provided.

II.—Since the filing of the said original bill, the said defendant has answered the same, and, in so doing, has set forth in its answer, on page 29 thereof, and to which this plaintiff refers, a contract between itself and the Pacific Express Company in said bill mentioned, and which

said contract is alleged to have been executed on the 31st day of January, 1881, to take effect on the 1st day of February, 1881.

III.—The said contract between the defendant and the said Adams Express Company in said original bill set forth contained among other provisions the following:

'3. As part compensation to the railway company for the privileges furnished by it as herein provided, the express company will pay to the railway company monthly one hundred dollars per day for each and every day that trains are run over the railway, or any part thereof.

5. The railway company agree further that they will not carry freight or packages for pay in their baggage cars on passenger trains, nor allow their conductors or baggage masters, or other employes to do so during the existence of this agreement, nor will they allow any other company, firm or person the privilege of carrying freight on their passenger trains at any less rate of payment per day, or any greater weight in a car, or upon any better terms in any way than is granted to said express company under this agreement.'

IV.—He avers that the said compensation of one hundred dollars per day in said clause of said agreement provided was, by the consent of both parties thereto, subsequently increased to one hundred and seventy-five dollars per day, and that the said Adams Express Company were paying at and after that rate at the time of the commencement of this suit.

V.—He avers that the said agreement between the said defendant and the said Pacific Express Company contained among other provisions the following:

'As compensation to the railway company for the privileges furnished as herein provided, the said Pacific Express Company agrees to pay to the said railway company the sum of two hundred and twenty-five dollars per day for each and every day that a passenger train is run. * * * It is further agreed by the said Missouri, Kansas and Texas Railway Company that it will not itself, nor will it permit its baggage masters, conductors or other employees to carry any freight, money or other package in its baggage cars for pay, nor will it allow any other company, firm or person the privilege of carrying freight on its passenger trains at any less rate of payment per day, or upon any better terms in any way than is afforded to said Pacific Express Company under this agreement.'

VI.—He avers that since on or about the said 1st day of February, 1881, the said Adams Express Company and the said Pacific Express Company have both been engaged in the conduct of an express business over the lines of the defendant's railway, and are both now so daily engaged.

VII.—He avers that the sum of one hundred and seventy-five dollars per day, so heretofore paid by the said Adams Express Company, was paid by it when it was in the sole enjoyment of the express business over the defendant's line, and was as large a sum as the said defendant could reasonably or justly demand for such sole enjoyment of of its express facilities.

VIII.—He avers that the sum of two hundred and twenty-five dollars per day, so nominated in the said contract of the said Pacific Express Company, is an advance of fifty dollars per day, or, for three hundred and thirteen working days in the year, an advance of fifteen thousand six hundred and fifty dollars per annum over the sum of one hundred and seventy-five dollars per day, so heretofore paid by the said Adams Express Company.

IX.—He avers that the sum of two hundred and twenty-five dollars per day is not a just or a reasonable sum for the Adams Express Company or any other express company to pay, even for the sole enjoyment of express facilities over the defendant's lines, nor is the same a just or reasonable sum for the Adams Express Company, or any other company, to pay for such facilities, when the same and the business pursued thereby are divided as they are now divided between two express companies.

X.—He avers that, during the year 1880, the said Adams Express Company paid the said defendant for transportation the sum of $51,700, for which the defendant transported for said Express Company, 1,336,637 pounds, or 668 tons of express freight, or at the rate of $77.33 per ton for the 590 miles of the defendant's lines occupied by the said Express Company, or at the rate of 13.1 per ton per mile. The entire receipts of the said Adams Express Company from the said defendant's lines during the same year were $80,612.75, of which the said defendant received $51,700, or 77.1 per cent. The ordinary payments by the express companies to the railway companies do not exceed 40 per cent. of gross receipts, and the defendant has received, under said contract of one hundred and seventy-five dollars per day, 37.1 per cent. more than the other railway companies in the United States have demanded and received for similar services rendered to the express companies generally.

XI.—He avers that the defendant's line, so far as local express business is concerned, is not a profitable line for an express company to operate ; that it is a necessary link for the Adams Express Company in its chain of inter-State commercial intercourse between the Eastern and Western and the Southern States, and in the conduct of the inter-State commerce committed to its care ; that it is not and never has been a source of profit or income to the Adams Express Company, and that its main value consists in enabling such express company as operates

the same to receive and transport express matter to and from points beyond its termini, and going to or coming from different States.

XII.—He avers, as he has hereinbefore averred, that the sum of one hundred and seventy-five dollars per day was a just, full, reasonable and adequate compensation to the defendant for all the facilities which it afforded to the Adams Express Company when it was so as aforesaid in the sole enjoyment thereof, and that the sum of two hundred and twenty-five dollars per day is not a legal, or a just, or a reasonable sum to require the said Adams Express Company to pay for such facilities when the enjoyment of the same and the business incident thereto are divided between the said Adams Express Company and the said Pacifiic Express Company.

XIII.—He avers that, at or about the time of the filing of the said answer, and on or about the 12th and 13th of March, 1881, the said Adams Express Company offered to arrange with the defendant for a continuance of the enjoyment of the said facilities on its lines and to continue the payment of the said sum of one hundred and seventy-five dollars per day until the further order of this Honorable Court herein, or to pay the said sum of two hundred and twenty-five dollars per day until such order, if the said defendant would undertake and promise to refund the said express company such proportion thereof, if any, as this Court might determine to be in excess of a just and reasonable sum to be paid by it, and that such offer was declined.

XIV.—He avers, upon information and belief, that the said contract with the said Pacific Express Company is an illusory one, and that the express business upon the defendant's line does not warrant or justify the undertaking or the requirement to pay the said sum of two hundred and twenty-five dollars per day therein specified.

XV.—He avers that the said Adams Express Company is now in the possession of the good-will of its customers, and is daily occupied in the conduct of its business over the lines of the said defendant's railway, and in the conduct of an inter-State commerce thereon, and that it will be greatly injurious to the business of the said Adams Express Company if it should be ejected or excluded therefrom, and that there is no legal or practical necessity for such or any exclusion of the said express company therefrom, and that the said Adams Express Company is willing as aforesaid to conform to all proper rules and regulations of the said defendant, and offers to pay, as it hereby does, such just and reasonable compensation as this Honorable Court shall determine and decree for the continuance and enjoyment of said facilities as are needed by the said Adams Express Company over the defendant's line, and such as have been heretofore accorded to it, and such as are stipulated and provided for in said contract with the said Pacific Express Company.

Wherefore, this plaintiff prays,

1. That this bill may be filed as a supplemental bill, or as a supplement to the original bill herein.

2. That the said defendant may be adjudged and decreed to receive for transportation express matter and messengers of the Adams Express Company at all its depots and stations, and transport the same to destination and without molestation or hindrance, and to afford all the necessary facilities therefor on its trains and at its depots and stations, and upon the same trains, and to the same extent as it now affords or has agreed by its said contract to afford the same to the said Pacific Express Company, and for such just, lawful and reasonable compensation as this Honorable Court, in view of all the circumstances, may determine.

3. That a provisional or preliminary, and a permanent injunction may issue herein, restraining the said defendant from interfering with the enjoyment by the Adams Express Company of all the express facilities over the defendant's line which have been heretofore accorded to such express company, and from preventing or interfering with the enjoyment by the said Adams Express Company of the same facilities upon the line of the defendant's railway for the conduct of the express business of the said Adams Express Company thereon as are afforded by the said defendant to the said Pacific Express Company under its said contract set forth in the answer herein or otherwise, so long as the said Adams Express Company shall be ready and willing, and shall offer to pay such compensassion therefor as this Court may determine and decree to be just and reasonable, and to observe such reasonable rules and regulations of the said defendant as are imposed upon the said Pacific Express Company.

4. That the said plaintiff may have such other or further or different relief herein as the nature of the case may require, and as to the Court may seem meet, together with the relief originally prayed in and by said original bill, and that the defendant may be decreed to answer this bill in like manner as this plaintiff has heretofore prayed that it might answer such original bill.

And this plaintiff will ever pray, &c.

WILLIAM B. DINSMORE,
As President of the Adams Express Company, and a shareholder therein.

BLAIR & PERRY,
CLARENCE A. SEWARD,
F. E. WHITFIELD,
Solicitors and of Counsel.

UNITED STATES OF AMERICA, } ss. :
Southern District of New York, }

On this 31st day of March, 1881, before me personally appeared William B. Dinsmore, to me known to be the plaintiff in the foregoing supplement bill of complaint, and who has signed the same; and he being by me duly sworn, did depose and say that he has read the foregoing supplemental bill, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes the same to be true.

JOSEPH GUTMAN, JR.,
[L. S.] *United States Commissioner,*
Southern District of New York.

[Endorsed: Filed by consent as of the May rules.

A. L. WILLIAMS,
Sol'r for Defendant."]

VIII.—After the 1st day of January, 1881, on which the defendant so notified the express company that it intended to commence to conduct the express business on its own behalf, the Adams Express Company continued under the protection of said orders to conduct its express business over the defendant's line, and has since continued to conduct, and is now so engaged in conducting the same and in competition with the Pacific Express.

IX.—Since the contract between the parties was so as aforesaid terminated, no rate or other mode of compensation has been agreed upon or has existed between the parties fixing or determining the quantum of compensation to be paid by the Adams Express Company for the facilities enjoyed by it.

X.—A replication was duly filed to the answer on the 15th of March, 1881, and is contained in the transcript, and thereafter the plaintiff proceeded to take the testimony which should have been set forth in the transcript.

XI.—On the 16th day of May, 1881, after the filing of the answer, and the replication, and the supplemental bill, the defendant filed in the clerk's office of the said Circuit Court, as appears by said transcript, a paper purporting to be a demurrer and which is set out in the transcript in these words:

"In the Circuit Court of the United States for the district of Kansas. —William B. Dinsmore, as President of the Adams Express Company and a shareholder therein, complainant, against The Missouri, Kansas and Texas Railway Company, respondent

The respondent, the Missouri, Kansas & Texas Railway Company, by protestation not confessing all or any of the matters and things in the said complainant's original and supplemental bills contained to be true, in such manner and form as the same are therein set forth and alleged, does demur thereto, and for cause of demurrer [shows] says : 1. That it appears from the statements in said bill of complaint [contained] that numerous other persons therein referred to [as] are shareholders of the Adams Express Company, and necessary parties to said bill. 2. That it appears from the statements in said bill of complaint that the said Adams Express Company is an incorporated association, with a president and other officers, and yet this suit was not instituted in the name of said corporation, nor is it anywhere stated in said bill that the directors [or] as managing officers thereof [ever] have refused to institute this suit in the name of said corporation, or that they ever were requested or desired to do so. 3. That it does not appear from the statements in said bill of complaint that the several parties designated therein as shareholders, or any of them, have any interest whatever in this suit, or in its results, or that the end[s] sought to be attained will result in benefit to all or any of said shareholders. 4. That it appears from the statements in said bills of complaint that, at the time this suit was commenced there had been issued, and were then outstanding, 120,000 shares of the capital stock of said corporation, which were held and owned by 2,500 different persons, none of whom were residents of the State of Kansas, in which this suit was instituted, and that only one of said shareholders, viz.: the plaintiff in this suit, who is designated as a shareholder, without stating the number of shares owned by him, is named as complainant in said bill, and there is no averment that any one or more of the other two thousand four hundred shareholders in said corporation is interested in this suit or in results, or that one or more of them requested or desired this suit to be instituted, or knew that it was to be instituted. 5. That the corporation has not been made a party to this suit. 6. That all the shareholders in said "incorporated association" should have been made parties, or a part should have filed the bill, stating the number and value of the shares held by them on behalf of themselves and all others who might elect to come in and make themselves parties. 7. That no reason is stated in said bills of complaint why the corporation did not institute this suit, or was not made a party thereto. 8. That it appears from the statements in said bills of complaint that this Court has no jurisdiction of this case. 9. That it does not appear

from the statements in said bills of complaint that this suit is against the directors, trustees, or other officers of said corporation, that any fraud has been committed, any trust betrayed, or any duty violated. 10. That said bills of complaint are multifarious. That in said bills of complaint there are many distinct matters and things stated, in many of which, as appears in said statements themselves, this defendant is in no way interested, and by reason of such distinct and irrelevant matters and things the said bills are drawn out to an unreasonable length, and this defendant is compelled to take a copy of the whole thereof, and by thus joining such distinct and irrelevant matters and things together, which do not depend upon each other, and have nothing to do with each other, the proceedings in the progress of this suit will be intricate and prolix, and this defendant will be put to great and unnecessary charges and expenses. 11. That there is no equity in said bills of complaint. 12. That the complainants have a full, complete and adequate remedy at law. 13. That the said bills of complaint do not state facts sufficient to constitute a cause of action in a court of equity.

THOS. J. PORTIS,
WILLIAMS & DILLON,
Sols. for Defts.

A certified copy of this demurrer was, on the 8th day of October, 1881, furnished to the counsel for the plaintiff, and at the date of such certificate the same did not have appended thereto any certificate of counsel, or any affidavit as required by Rule 31 of this Court. The demurrer, as so filed, substituted the words in brackets hereinbefore set forth for the words which immediately follow such brackets.

XII.—It further appears, by said transcript that, on the 14th day of June, 1881, at the June Term of said Court, the following order was made:

"This cause is continued until the next term of this Court, and the injunction *pendente lite* heretofore granted herein is also continued until the hearing of this cause, and the decree of the Court therein, upon the same terms of payment and compensation mentioned in said order."

XIII.—It further appears by said transcript that on Friday, September 30, 1881, the clerk of said Court made an entry on the order book of said Court in said entitled suit, which entry is in the words and figures following, to wit:

"Friday, September 30, 1881.—William B. Dinsmore, as President of the Adams Express Company, &c., against The Missouri, Kansas &

Texas Railway Company.—To the above-named defendant and its solicitors: Notice is hereby given you that the complainant in the suit above entitled desires the evidence adduced in the cause to be taken orally, and that upon the 30th day of September, 1881, at 3 P. M., or as soon thereafter as may be, the said complainant will apply at Chambers by motion to the Honorable C. J. Foster, Judge of this Court, in the City of Topeka, in said district, for the special appointment of an Examiner, before whom said evidence may be adduced.—Blair & Perry, Solicitors for Complainant. Service of the above notice is hereby acknowledged, and we consent that the application for the special appointment of an Examiner may be made at the time specified.—Williams & Dillon, Solicitors for Defendant."

And on Friday, September 30, 1881, the Clerk of said Court made a further entry on the order-book of said Court in said entitled suit, which is in the words and figures following, to wit:

"William B. Dinsmore, as President of Adams Express Company, &c., against the Missouri, Kansas, and Texas Railway Company. Application at Chambers for the special appointment of an Examiner, before whom evidence on behalf of the complainant may be adduced. To the Honorable C. J. Foster, Judge of said Court: The complainant above named most respectfully moves your Honor to specially appoint an Examiner in the cause above entitled, before whom evidence on behalf of the complainant may be adduced, and that you make the proper order therein; and complainant refers to the affidavit below in support of this application.—Blair & Perry, Solicitors for Complainant.

At Chambers, Topeka, Kansas, September, 1881: On hearing the the foregoing application and affidavit read, it is ordered that Wm. H. Rossington, of Topeka, Kansas, a solicitor of this Court, be and hereby is, specially appointed Examiner, with all the powers conferred on such officers by the 67th Rule of Practice for Equity Courts of the United States, and the complainant will furnish said Examiner with copies of the Bill of Complaint and Answer herein.—C. J. Foster, Judge."

XIV.—On the 1st day of December, 1881, the said William H. Rossington, so appointed Special Examiner, filed his report as such Examiner, and which said report contained the evidence, in said suit, of Isaiah C. Babcock, George B. Sherman, Frederick Lovejoy, Henry Sanford, W. L. Hubbell, James C. Fargo, George S. Coe, James M. Thompson, Clapp Spooner, John R. Hall, Edwards S. Sanford, A. Hegewisch, Henry V.

Poor, Charles H. Howard, L. C. Weir and Frank R. Fennessey. The said report had annexed thereto the certificate of the Examiner, as follows:

"UNITED STATES OF AMERICA, }
Southern District of New York. }

I, William H. Rossington, heretofore appointed by the Court Special Examiner to take the depositions of the parties in this suit pending in the Circuit Court of the United States for the District of Kansas, between William B. Dinsmore, as President of the Adams Express Company, and a shareholder therein, as complainant, and the Missouri, Kansas and Texas Railway Company, as defendant, do hereby respectfully report that I have been attended by the party complainant, defendant having, as heretofore set forth, been duly notified and not attending by counsel or otherwise, and that thereupon were duly taken by and before me the depositions of Messrs. Babcock, Lovejoy, Sherman, Coe, Spooner, Hegewisch, E. S. Sanford, Weir, Howard, Hall, Fennessey, Hubbell, Poor, and Henry Sanford, and which said depositions are herewith annexed and returned, together with the various exhibits and certified copies also hereto annexed, and herewith returned by me as such Examiner.—William H. Rossington, Special Examiner. Dated at New York, this 12th day of November, 1881."

Which was endorsed as follows:

["No. 3,307.—Report of Wm. H. Rossington, filed Dec. 1, 1881.—A. S. Thomas, Clerk.] United States of America, District of Kansas. I, A. S. Thomas, Clerk of the Circuit Court of the United States of America for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the certificate of Wm. H. Rossington attached to his report as Special Examiner in the suit of William B. Dinsmore, as President of the Adams Express Company, and a shareholder therein, *vs.* The Missouri, Kansas & Texas Railway Company, No. 3,307, and endorsement on said report. In testimony whereof, I have hereunto set my hand this 31st day of October, 1882.—A. S. Thomas, Clerk. [Seal.]"

The original of the foregoing certificate will be found among the original motion papers herewith submitted.

The notification referred to by the said Examiner in his said report was annexed to, and now constitutes a part of his said report, so filed in the office of the Clerk of the said Circuit Court in this cause, and said notice contained the title of the said cause, and in addition thereto was in the words and figures following:

"Whereas, I have by the consideration of the above entitled Court,

been duly appointed Special Examiner to take the testimony therein, it is therefore by me ordered that the testimony to be adduced on behalf of the complainant be taken orally under the 67th Rule of the Supreme Court in Equity, as amended; and that the taking of said testimony begin before me at the office of Blatchford, Seward, Griswold & Da Costa, at 29 Nassau Street, in the City of New York, on the 26th day of October, 1881, at 11 o'clock A.M. of said day, and thereafter proceed as I shall direct; of the time and place aforesaid and of all the contents of the foregoing order that defendant be forthwith duly notified. Dated at Topeka this 21st of October, 1881.—Wm. H. Rossington, Special Examiner."

The said report so filed by the said Examiner also contained therein a notice entitled in the cause, and which then proceeded as follows:

GENTLEMEN—You will please take notice that the complainant in the above case desires the evidence to be produced therein to be taken orally under the 67th Rule of the Supreme Court as amended; and you will further take notice that, by an order made in said cause by Wm. H. Rossington, a Special Examiner appointed by the Court herein, the examination of witnesses on the part of said complainant will take place before said Examiner at the law offices of Blatchford, Seward, Griswold & DaCosta, at 29 Nassau Street, in the City of New York, on the 26th day of October, A. D. 1881, at 11 o'clock A. M., and proceed as the said Examiner may direct. Dated at Topeka, October 21, A. D. 1881. Yours, &c., C. A. Seward, Solicitor for Complainant. To Williams & Dillon, Solicitors for Defendant."

And to this notice, and which is on file with the said clerk, is the following affidavit:

"STATE OF KANSAS, } ss.:
Shawnee County, }

JOSEPH H. DRAUSFULD, of lawful age, and by me first duly sworn deposes and says that on the 22d day of October, A.D. 1881, at 9.30 A.M. of said day he served a true and perfect copy of the foregoing notice to take depositions in the case of William B. Dinsmore, as President of the Adams Express Company and stockholder therein, *vs.* Missouri, Kansas & Texas R. R. Company upon A. L. Williams, one of the solicitors of the defendant, by leaving such copy with him personally at his office, on Kansas Avenue, between Eighth and Ninth Streets, City of Topeka, Kansas.

JOSEPH H. DRAUSFULD.

Sworn to before me, this 22d day of October, A.D. 1881. D. E. Sowers, Notary Public, Commission expires January 6th, 1885.—[L. S.]"

XV.—The cause, in connection with other similar ones, was argued on the pleadings and proofs at St. Louis, on the 7th, 8th and 9th days of February, 1882, before the full Bench, composed of Associate Justice MILLER and MCCRARY, *C. J.*

The said cause was brought on for argument under and pursuant to stipulation and notice of argument and proof of service, which were in the words and figures following:

"UNITED STATES CIRCUIT COURT,
DISTRICT OF KANSAS.

WILLIAM B. DINSMORE, as President of the Adams Express Company, and a Shareholder therein,

vs.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

It is hereby stipulated that the above cause may be brought on for argument before the Honorable George W. McCrary, Circuit Judge, at St. Louis, at such time in January next as the said Judge may appoint, for hearing arguments in the other cases involving similar questions.

Dated October 3d, 1881.

C. A. SEWARD,
Solr. and of Counsel for Plaintiff.
THOS. J. PORTIS,
Atty. for Deft."

"IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF KANSAS.

WILLIAM B. DINSMORE, as President of Adams Express Company, and a Shareholder therein,

vs.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

SIRS—Please take notice, that the above suit will be brought on for argument and final hearing on pleadings and proofs before the Judges of this Court, at a term thereof to be held on the seventh day of February, 1882, at the Court-House, in the City of St. Louis, at the opening of the Court on that day, or as soon thereafter as counsel can be heard.

Dated the 7th day of January, 1882.

Yours, &c.,

BLAIR & PERRY,
CLARENCE A. SEWARD,
Solicitors for Plaintiff.

To WILLIAMS & DILLON,
Solicitors for Defendant.

STATE OF KANSAS, *County of Shawnee*, } ss.:

I, JOSEPH H. DRAUSFULD, being first duly sworn, deposes and says: That I served a copy of the within instrument upon defendant herein by handing to Hiram P. Dillon, of the firm of Williams & Dillon, solicitors for said defendant, at their office, No. 275 Kansas Avenue, Topeka, Shawnee County, Kansas, this 10th day of January, A. D. 1882, at twenty-five minutes past three o'clock P. M. of said day.

JOS. H. DRAUSFULD.

Sworn to and subscribed before me this 13th day of January, A.D. 1882.

CHAS. B. SMITH,
Notary Public—Commission expires July 8, 1882."

A copy of the proofs as printed, was furnished to the counsel for the defendant on said argument, and a copy was also presented to each of the members of said Court. The said cause

was argued on behalf of the defendant, and in its argument the counsel therefor made the objection that it did not appear upon the face of said bill that no one of the shareholders of the said Adams Express Company was not a resident within the District of Columbia or within some one of the Territories of the United States, and thereupon, to overcome said objection, it appears from the said transcript that the following order was made and is returned in said transcript in the words and figures following:

"And on February 11th, 1882, the Clerk of said Court made a further entry on the Order Book of said Court in said entitled suit, which entry is in the words and figures following, to-wit: William B. Dinsmore, as President of the Adams Express Company, &c., against The Missouri, Kansas and Texas Railroad Company. Upon the application of the complainant, it is hereby ordered that the complainant have leave to amend the bill herein, by inserting in the second paragraph of the third subdivision thereof, after the words "United States," the words "and of States thereof other than the State of Kansas."—Geo. W. McCrary, Circuit Judge. We consent to the within.—Thos. J. Portis, A. L. Williams, for defendant.

The original paragraph referred to in said order before its amendment read:

"The holders of said shares now exceed 2,500 in number, and are all now citizens and residents of the United States, but no one of said shareholders is a citizen of or resident in the State of Kansas, and said 2,500 shareholders are too numerous to be joined as co-plaintiffs herein."

The said paragraph of said bill after the allowance of said amendment reads as follows:

"The holders of said shares now exceed 2,500 in number, and are all now citizens and residents of the United States and of States thereof, other than the State of Kansas, but no one of said shareholders is a citizen of or resident in the State of Kansas, and said 2,500 shareholders are too numerous to be joined as co-plaintiffs herein."

XVI.—The appellee has inquired of the Clerk of said Circuit Court of the United States, for the District of Kansas, whether the record of the evidence, testimony, depositions and proofs so filed by the said examiner was not on file in his office, and if so, why he had not returned a copy thereof in the transcript to this Court. To which inquiry the said Clerk on the 31st day of October, 1882, made answer as follows:

"In the Circuit Court of the United States, for the District of Kansas. William B. Dinsmore, as President of the Adams Express Company, and a shareholder therein, *vs.* The Missouri, Kansas and Texas Railway Company, No. 3,307—In Equity.

I, A. S. Thomas, Clerk of the Circuit Court of the United States, for the District of Kansas, do hereby certify that the report of William H. Rossington, Special Examiner in said entitled suit, was filed Dec. 1, 1881, and is now among the papers in said suit, in the Clerk's office of said Court, endorsed 'No. 3,307—Report of W. H. Rossington, filed Dec. 1, 1881—A. S. Thomas, Clerk,' and contains the evidence of the following named persons in said suit, to wit: Isaiah C. Babcock, George B. Seymour, Frederick Lovejoy, Henry Sanford, Wm. Hubbell, James C. Fargo, George A. Coe, James M. Thompson, Clapp Spooner, John R. Hall, Edwards S. Sanford, A. Hegewisch, Henry V. Poor, Charles H. Howard, L. C. Weir, Frank R. Fennessy. I see no reason why the transcript should not contain said report and evidence, and it must have been my mistake in leaving it out of the transcript on appeal. In testimony whereof, I hereunto set my hand and affix the seal of said Court, at my office in Topeka, in said District of Kansas, this 31st day of October, 1882.—A. S. THOMAS, Clerk.—[L. S.]"

The original of such certificate will be found among the original motion papers herein.

XVII.—The opinion of the Court was pronounced on the 21st day of February, 1882, by Mr. Justice MILLER, in the words and figures following:

"IN THE CIRCUIT COURT OF THE UNITED STATES,

EIGHTH CIRCUIT.

WILLIAM B. DINSMORE, Pres. Adams Express Co., &c., *vs.* THE MISSOURI, KANSAS & TEXAS RAILWAY CO.	*District of Kansas.*
SAME *vs.* THE ATCHISON, TOPEKA & SANTA FE RAILROAD CO.	*District of Kansas.*
SAME *vs.* THE DENVER & RIO GRANDE RAILWAY COMPANY.	*District of Colorado.*
THE SOUTHERN EXPRESS CO. *vs.* THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.	*Eastern District of Missouri.*
THE SOUTHERN EXPRESS CO. *vs.* THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY.	*Eastern District of Arkansas.*

MILLER, *Circuit Justice:*

In these cases, argued before me at St. Louis, with Judges McCrary and Treat, I can do no more than present certain general conclusions at which my mind has arrived in regard to the propositions argued by counsel:

1. I am of the opinion that what is known as the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized.

That while it is not possible to give a definition in terms which will embrace all the classes of articles so usually carried and to define it

with precision by words of exclusion, the general character of the business is sufficiently known and recognized as to require the Court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads.

That the object of this express business is to carry small and valuable packages rapidly, in such a manner as not to subject them to the danger of loss and damage, which to a greater or less degree attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise and the like.

2. It has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent or messenger of the person or company engaged in it, and to refuse permission to this agent to accompany these packages on steamboats or railroads on which they are carried, and to deny them the right to the control of them while so carried, is destructive of the business and of the rights which the public have to the use of the railroads in this class of transportation.

3. I am of the opinion that when express matter is so confided to the charge of an agent or messenger, the railroad company is no longer liable to all the obligations of a common carrier, but that when loss or injury occurs, the liability depends upon the exercise of due care, skill and diligence on the part of the railroad company.

4. That under these circumstances there does not exist on the part of the railroad company the right to open and inspect all packages so carried, especially when they have been duly closed or sealed up by their owners or by the express carrier.

5. I am of the opinion that it is the duty of every railroad company to provide such conveyance by special cars, or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business.

If the number of persons claiming the right to engage in this business at the same time, on the same road, should become oppressive, other considerations might prevail; but until such a state of affairs is shown to be actually in existence in good faith, it is unnecessary to consider it.

6. This express matter and the person in charge of it should be carried by the railroad company at fair and reasonable rates of compensation; and where the parties concerned cannot agree upon what that is, it is a question for the Courts to decide.

7. I am of the opinion that a Court of Equity in a case properly made out has the authority to compel the railroad companies to carry

this express matter, and to perform the duties in that respect which I have already indicated, and to make such orders and decrees, and to enforce them by the ordinary methods in use necessary to that end.

8. While I doubt the right of the Court to fix in advance the precise rates which the express companies shall pay and the railroad companies shall accept, I have no doubt of its right to compel the performance of the service by the railroad company, and after it is rendered, to ascertain the reasonable compensation and compel its payment.

9. To permit the railroad company to fix upon a rate of compensation which is absolute, and insist upon the payment in advance or at the end of every train, would be to enable them to defeat the just rights of the express companies, to destroy their business, and would be a practical denial of justice.

10. To avoid this difficulty, I think that the Court can assume that the rates, or other mode of compensation heretofore existing between any such companies, are *prima facie* reasonable and just, and can require the parties to conform to it as the business progresses, with the right to either party to keep and present an account of the business to the Court at stated intervals, and claim an addition to, or rebate from, the amount so paid.

And to secure the railroad companies in any sum which may be thus found due them, a bond from the express company may be required in advance.

11. When no such arrangement has heretofore been in existence, it is competent for the Coort to devise some mode of compensation to be paid as the business progresses, with like power of final revision on evidence, reference to master, etc.

12. I am of opinion that neither the statutes, nor constitutions of Arkansas or Missouri, were intended to affect the right asserted in these cases; nor do they present any obstacle to such decrees as may enforce the rights of the express companies."

XVIII.—On the same 21st day of February, 1882, as appears by the transcript, a further order was made in said cause and entered in said Clerk's office on the 23d day of February, 1882, in these words:

"William B. Dinsmore, as President of Adams Express Company, &c., against The Missouri, Kansas & Texas Railway Company. In this case it is ordered that the injunction heretofore granted shall remain in force until otherwise ordered by the Court. Counsel will be heard at a convenient time upon the question of the form of the decree to be herein entered in pursuance of the opinion of the Court, announced by Mr. Justice Miller, and herewith filed, February 21, 1882.—Geo. W. McCrary, Circuit Judge."

XIX.—The transcript then further states as follows:

"And on this day, to wit, June 8th, 1882, the clerk of said Court made an entry on the Order Book of said Court in said entitled suit, which entry is in the words and figures following, to wit:

To the Honorable the Judges of the said Circuit Court:

Your petititioner, the complainant above mentioned, now files this his petition herein, and respectfully represents:

That, at and prior to the 27th day of December, 1880, the Adams Express Company was in the sole and exclusive possession of express facilities upon the line of defendant's railway, for which it was paying a rental of $175 per day: that about the date aforesaid, which was the time of complainant filing his original bill in this cause, the defendant made a contract with the Pacific Express Company, which thereafter also operated its express on said railway, whereby the express business originating along the line of defendant's railway was divided between the two express companies, and the revenue of the Adams Express Company from said business reduced more than fifty per centum; that the provisional order of injunction in this cause, granted and made about the day of , 1881, required said Adams Express Company to pay said defendant railway company for the express facilities afforded it during the litigation the sum of $175 per day, which was to be payment on account of what was actually due for such services—which amount was to be ascertained and settled thereafter as the Court should determine; that ever since such provisional or temporary order the said Adams Express Company has been paying for said facilities, and this decreased business, the sum of $175 for each and every intervening day; that the sum actually paid by said Adams Express Company is largely in excess of what should be paid, or what is actually due for said services, computed upon the basis of fifty per centum above actual or prescribed rates for ordinary freight, or upon any other just or reasonable rate or basis of compensation; wherefore, in order to settle permanently what was and is and will be, up to the termination of the proceedings originated by this petition, a just and fair compensation for the services rendered and to be rendered, and to determine upon what side and to what amount the balance lies—your petitioner respectfully prays that the questions raised herein be referred to some suitable person to be appointed by the Court, or agreed upon by and between the parties, as a Special Master of this Court in this cause, with all the powers of Masters conferred by the rules of practice prescribed by the Supreme Court of the United States for Courts of Equity of the United States, and particularly specified in Rules 74 to 83 thereof, both inclusive, and with power also to re-examine any of the witnesses heretofore examined herein, and to use as evidence all the testimony heretofore

taken in this cause, to conduct the proceedings before him, and to take testimony in the cause at such place within or without the District of Kansas as he may designate, and that he be required to take testimony at St. Louis, Cincinnati, and New York, upon the demand of either party herein; that he be required to take and state an account of the express business conducted by the Adams Express Company over the defendant's lines of railway from the commencement of this suit up to the termination of the proceedings before such Special Master, and to fix and determine what was and is a just and reasonable compensation to be paid by the Adams Express Company to the defendant, for the use and enjoyment of the facilities and privileges accorded to it on the defendant's lines of railway since the commencement of this suit, and up to the conclusion of the proceedings before such Special Master, and to report the same to this Court, together with the amounts paid by the said Adams Express Company to the defendant for such services from the commencement of this suit up to the date of said Special Master's report; and that said report be accompanied with all the evidence taken before him or heard or considered by him, whether the same be oral or documentary; and that, upon the filing of said report, and the consideration thereof by the Court, such decree may be made thereon as to the measure of compensation as may be just and equitable to both parties in this cause.

And your petitioner, as in duty bound, will ever pray, &c.

C. A. Seward, F. E. Whitfield, Blair & Perry, Solicitors for petitioner. [Endorsed]: Filed June 8, 1882.—A. S. Thomas, Clerk; by George M. Holmes, Deputy."

And on this day, to wit, Thursday, June 8th, 1882, in the June Term of said Court, in the record of proceedings thereof in said entitled suit, is the following entry:

"In the Circuit Court of the United States for the District of Kansas, William B. Dinsmore, as President of the Adams Express Company, and shareholder therein, Complainant, *vs.* The Missouri, Kansas and Texas Railway Company, Defendant.—In Equity.

And now, at this day, to wit, the [June 8, 1882] day of June, this cause coming on to be further heard upon the petition filed by the complainant herein for the appointment of a Special Master to take and state an account between the parties as to the compensation that should be and has been paid during the litigation, and up to the final termination thereof, and to take and hear testimony in regard thereto, and the same having been fully considered by the Court, it is ordered, adjudged and decreed as follows:

I.—That the matters in dispute as above indicated and more fully set forth in complainant's petition be and the same are hereby referred

to W. H. Rossington, Esq., an attorney and solicitor of this Court, as Special Master of this Court in this cause, with all the powers of Masters conferred by the rules of practice of the Supreme Court of the United States prescribed for the government of Courts of Equity of the United States, and particularly specified in Rules 73 to 84 thereof, both inclusive, and with power to re-examine any of the witnesses heretofore examined herein, and to use as evidence any and all testimony heretofore taken in the cause; to conduct the proceedings before him, and to take testimony therein at such places within or without the District of Kansas, as he may designate, and that he may be required to take testimony at St. Louis, Cincinnati, and New York, upon the request of either party herein; that he take and state an account of the express business conducted by the Adams Express Company over defendant's lines of railway since the commencement of this suit, and up to the termination of the proceedings before such Special Master; and that he fix and determine what was and is a just and reasonable compensation to be paid by the Adams Express Company to the defendants for the use and enjoyment of the facilities and privileges accorded to it on the defendant's lines of railway since the commencement of this suit, and up to the conclusion of the proceedings before such Special Master; and to report the same to this Court, together with the amounts paid by the Adams Express Company to the defendant since the commencement of this suit, and up to the date of said report; and that he accompany said report with all the evidence taken and considered by him, whether documentary or oral; and that upon the filing of said report, either party may have leave to apply to the Court for such further relief or decree thereon as to said measure of compensation as may be just and equitable.

II.—That the compensation of said Special Master be and the same is hereby fixed at twenty dollars per day, and that the same, together with his expenses, shall be paid by the parties hereto in equal proportions or moities as the said Special Master may from time to time request, and that the ultimate payment of such compensation and expenses abide the further order or this Court. George W. McCrary, Circuit Judge. Endorsed: No. 3307, William B Dinsmore, as President, &c., vs. Missouri, Kansas & Texas Railway Company. Order appointing Special Master. Filed June 8, 1882.—A. S. Thomas, Clerk, by Geo. M. Holmes, Deputy."

And on this day, to wit, Thursday, June 8, 1882, in the June Term of said Court, in the record of the proceedings thereof in said entitled suit, is the following entry, to wit:

"In the Circuit Court of the United States for the District of Kansas. In Equity.—William B. Dinsmore, as President of the Adams Express

Company, and a shareholder therein, Complainant, vs. The Missouri, Kansas & Texas Railway Company, Defendant. And now, at this day, to wit, the 8th day of June, 1882, this cause coming on to be heard, the defendant, by leave of the Court, first had and obtained for that purpose, withdrew the answer heretofore filed in this cause, and interposed a demurrer to the bill of complaint of the complainant, which, after argument by counsel, was overruled by the Court.

Whereupon the defendant elected to stand upon its demurrer, and this cause came on to be further heard on the bill of complaint filed herein and was argued by counsel and then and there submitted to the Court, and the Court, on due consideration thereof, do order, adjudge and decree as follows :

I.—That the express business, as fully described and shown in the record, is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized, so as to require the Court to take notice of the same as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads.

II.—That it has become the law and usage, and is one of the necessities of the express business, that the property confided to an express company for transportation should be kept, while in transit, in the immediate charge of the messengers and agents of such express company.

III.—That to refuse permission to such messengers or agents to accompany such property on the steamboats or railroads on which it is to be carried, and to deny them the right to the control of the property while so carried, would be destructive of the express business, and of the rights which the public have to the use of such steamboats and railroads for the transportation of such property so under the control of such messengers or agents.

IV.—That neither the defendant, its officers, agents or servants, nor either nor any of them, have the right to open or inspect any of the packages or express matter which may be offered to it for transportation by the Adams Express Company, nor to demand a knowledge of the contents thereof, nor to refuse transportation thereof, unless such inspection be granted or such knowledge be afforded.

V.—That it is the duty of the defendant to carry the express matter of the Adams Express Company and the messengers and agents in charge thereof, at a just and reasonable rate of compensation ; and that such rate of compensation is to be found and established as a unit and is to include as well the transportation of such messengers and agents as of the express matter in their custody and under their control.

VI.—That since the 23rd day of November, 1871, the defendant and an intermediate receiver and trustee thereof have afforded to the

Adams Express Company all the facilities and privileges needed by said company for the conduct of its express business over the defendant's lines, and that the said company is now in the daily enjoyment of such facilities; that the same were originally afforded under a written contract as set forth in the bill herein; that on the first day of December, 1880, the defendant notified the said Adams Express Company that on the first day of January, 1881, such company would be expected to retire from the operation of the express business on the defendant's road; that it was the intention and purpose of the defendant to exclude the Adams Express Company from its lines on and after the 1st day of January, 1881; that such intention and purpose were restrained by the preliminary injunction order of this Court; that after its allowance the said Adams Express Company continued to have, possess and enjoy, and now has, possesses and enjoys all the facilities which it had possessed and enjoyed during the existence of said contract and prior to said injunction; that for the express facilities and privileges so accorded under the said contract to the said Adams Express Company for the conduct of its express business over the defendant's lines, the said Adams Express Company paid to said defendant as compensation the sum of $175.00 per day; that since the commencement of this suit, to wit, the 28th day of December, 1880, the said Adams Express Company has continued to pay to said defendant the said sum of $175.00 per day; that the said Adams Express Company is entitled to have, possess and enjoy a continuance of the said facilities and privileges for the conduct of its said express business on the lines of the defendant's railway, as the same are now had, possessed and enjoyed, and until the further order or decree of this Court, at a rate not exceeding fifty (50) per centum more than its actual rates for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account, or for any other express or other corporation, or for private individuals, which compensation is to be paid by said Adams Express Company on or before the 20th of each month for the preceding month, and that said express company keep and render monthly to the defendant a true account of the services performed for it by said defendant; that on the 31st day of January, 1881, the defendant entered into a contract which is set forth in the defendant's answer heretofore filed herein with the Pacific Express Company, under which it granted to the said Pacific Express Company the facilities and privileges for the conduct of an express business over the defendant's lines which are in said answer specified and set forth; that prior to the making of said contract with the said Pacific Express Company, the said Adams Express Company had been in the sole possession and enjoyment of the express business over and upon the lines of defendant's railways so occupied by the said Adams Express Company, and of the revenues

and income therefrom; that since the making of said contract with the said Pacific Express Company, to wit, from the 31st of January, 1881, the express business over the lines of the defendant therein specified has been divided between said Pacific Express Company and the said Adams Express Company, and the business of said Adams Express Company, and the profits and income thereof, have been thereby and are now continually greatly lessened and diminished.

VII.—That it is the duty of the defendant to continue to afford to Adams Express Company the same facilities as the defendant has heretofore afforded and is now affording to it, and as it has heretofore afforded, and is now affording to the said Pacific Express Company, under the contract aforesaid, and all such facilities as are necessary and as have been usually and customarily afforded to either of said companies for the conduct of the express business over the lines of said defendant's railway.

VIII.—That it was and is the duty of the said defendant to afford such facilities to the Adams Express Company as above provided for such compensation as is reasonable and just.

IX.—That the defendant has no right to require prepayment for the said express facilities, or payment therefor at the end of every train, or in any other manner than as hereinbefore provided.

X.—That the said defendant, its agents, servants, officers and employes, jointly and severally be, and they are hereby severally permanently and perpetually restrained and enjoined from interfering with or disturbing in any manner, the enjoyment by the Adams Express Company of the facilities now accorded to it by the said defendant upon its lines of railway, branches, leased lines and extensions for the transaction of the business of the said Adams Express Company, and of the express business of the public, confided to its care, and from interfering with any of the express matter or messengers of the Adams Express Company, and from excluding or ejecting any of its express matter or messengers from the depots, cars or lines of the said defendant as the same have been heretofore and are now enjoyed and occupied by the said Adams Express Company or its agents or messengers, and from refusing to receive and transport in like manner as the said defendant is now doing, and as it has heretofore done over its lines of railway, the express matter and messengers and agents of the said Adams Express Company, and from interfering with or disturbing the business of the said Adams Express Company or its present or former relations in reference thereto with the said defendant in any way or mannner whatsoever.

It is further ordered and adjudged and decreed that the complainant recover of the defendant herein the costs in this cause, taxed at five hundred and three dollars and forty cents ($503.40), with interest

from the date of this decree till paid, and that said complainant have execution therefor.

And the said defendant, excepting to all and singular the above findings, orders, decrees and judgments, prays an appeal of said cause to the Supreme Court of the United States, upon condition that said defendant executes a good and sufficient bond in the sum of one thousand dollars prepared, executed and conditioned according to the rules of this Court in equity cases.

GEO. W. McCRARY,
Circuit Judge.

No. 3,307. William B. Dinsmore, as President and Shareholder, &c., Complainant, *vs.* Missouri, Kansas and Texas Railway Company, Defendant. Decree. Filed June 8, 1882.—A. S. Thomas, Clerk."

XX.—The demurrer so referred to in said decree was in the words of the demurrer hereinbefore printed, substituting for the words in brackets the words which immediately follow, and to the same is appended, as appears by the said transcript, the following:

" The undersigned, counsel for defendant in this cause, hereby certify that, in their opinion, the foregoing demurrer to complainant's bill and supplemental bill in this cause, is well founded in point of law.

THOS. J. PORTIS,
WILLIAMS & DILLON,
Sols. for Deft.

Thomas J. Portis, being duly sworn, deposes and says that he is the regularly employed solicitor and attorney for the defendant corporation, and, as such, has charge of its legal business, and that he knows the foregoing demurrer in this cause is not interposed for delay.—Thos. J. Portis. Subscribed and sworn to before me, this 7th day of June, 1882.—A. S. Thomas, Clerk. The complainant waives all objections to the foregoing affidavit, both as to the form and substance.—Blair & Perry, Solicitors for Complainant."

Your petitioner therefore avers that no leave of the Court to withdraw the answer filed herein on the 5th day of March, 1881, was granted by the Court until the 8th day of June, 1882, and that no demurrer, certified and verified as required by Rule 31, was ever presented to said Circuit Court until the said 7th day of June, 1882.

XXI.—The said transcript then contains further entries, as follows:

"And on this day, to wit, June 23d, 1882, there was filed in the Clerk's office of said Court, an application for appeal by defendant, which application for appeal is in the words and figures following to-wit: In the Circuit Court of the United States, for the District of Kansas. William B. Dinsmore, as President of the Adams Express Company and a shareholder therein, respondent, against The Missouri, Kansas and Texas Railway Company, appellant. Now comes the defendant, by its solicitors, and objects and excepts to the decree entered in this cause, and each and every part thereof, and the said defendant, conceiving itself greatly aggrieved by the said decree, and each and every part thereof, prays the Court to allow it an appeal therefrom to the Supreme Court of the United States, and that a full and complete transcript of the record in this cause, together with copies of such entries and papers on file as may be necessary on the hearing of the appeal, be transmitted with all convenient despatch to the said Supreme Court. June 8th, 1882. Thos. J. Portis, Solicitor for Defendant. I hereby certify, that in my opinion there is good cause for appeal in the above stated cause.—Thos. J. Portis, Solicitor for Defendant. Thos. J. Portis, solicitor for defendant. Allowed: C. J. Foster, Judge. [Endorsed]: No. 3307. William B. Dinsmore, President of Adams Express Company, &c., *v.* The Missouri, Kansas and Texas Railway Company; in the Circuit Court of the United States, for the District of Kansas. Application for appeal by defendant, June Term, 1882. Filed June 23d, 1882.—A. S. Thomas, Clerk, by Geo. M. Holmes, Deputy.

And on this day, to wit, Friday, June 23d, 1882, in the June Term of said Court, in the record of the proceedings thereof in said entitled suit, is the following entry, to wit: William B. Dinsmore, as President of the Adams Express Company, &c., *vs.* The Missouri, Kansas & Texas Railway Company. Now at this day comes the defendant and tenders here in Court a bond in the sum of one thousand dollars, prepared, executed and conditioned as required in the decree hereinbefore entered in this cause, which said bond is by the Court approved and filed, and the appeal heretofore prayed for is granted, and said appeal to the Supreme Conrt of the United States is hereby allowed.

UNITED STATES OF AMERICA, *District of Kansas,* } *ss.:*

I, A. S. Thomas, Clerk of the Circuit Court of the United States of America for the District of Kansas, do hereby certify the foregoing to be a true, full and perfect copy from the record of all the proceedings in the suit of William B. Dinsmore, as President of the Adams Express Company, and a shareholder therein, *vs.* The Missouri, Kansas & Texas Railway Company—No. 3307—in said Court.

In testimony whereof, I have hereunto set my hand and affixed the

seal of said Court, at my office in Topeka, in said district of Kansas, this 30th day of August, 1882.--A. S Thomas, Clerk, by Geo. M. Holmes, Deputy."

XXII.—Your petitioner avers, as it is advised and believes, that the said certificate so appended to said transcript is not the certificate required by law.

XXIII.—Your petitioner avers, as it is advised and believes, that said transcript is defective, and that it does not contain the evidence taken before the said William H. Rossington as Examiner, and so as aforesaid returned by him to and filed with the Clerk of the said Circuit Court, and so now remaining on file in the office of the said Clerk, constituting the exhibits, depositions and proofs used on the argument of the cause in the said Circuit Court.

XXIV.—The said June Term of the Circuit Court of the United States for the District of Kansas was commenced at Leavenworth on the 5th day of June, 1882, and continued until the 10th of October, 1882, when the same was formally adjourned, as appears by the certificate of the Clerk hereto annexed.

Wherefore, your petitioner prays:

I.—That the said appeal may be dismissed by reason of the insufficiency of the certificate to the said transcript.

II.—That the said appeal may be dismissed upon the further following grounds:

1. Because this Court has no jurisdiction of said appeal.
2. Because the decree appealed from was and is not final.
3. Because the decree appealed from was and is interlocutory or provisional only.
4. Because the decree appealed from does not decide all the issues between the parties or those raised by the pleadings, and as to which the evidence taken before the said Examiner, and omitted from said transcript, was addressed.
5. Because the decree appealed from shows upon its face that it is not a final decree.
6. Because both of the said decrees of the 8th of June, 1882, are to be considered as one and the same decree, and that the same show that neither of said decrees was final, but that both of the same were interlocutory only, and that the said Circuit Court yet and now retains jurisdiction of the said cause and is

proceeding therein to secure the evidence necessary to enable it to decide the issues raised therein.

7. Because said appeal was and is premature.

III.—And in the event that said appeal should not be dismissed, then that a writ of certiorari may be issued by this Court, directed to the Clerk of the said Circuit Court of the United States for the District of Kansas, to bring up the portions of the record of said cause left back, and not included in the transcript as hereinbefore specifically set forth.

Your petitioner has caused copies of the foregoing motion, and of the notice of motion hereunder given, and of your petitioner's brief in support hereof, which is hereto annexed, to be duly served, according to the rules of this Court, upon the counsel in this Court for the appellant herein, and hereby annexes proof of such service.

WILLIAM B. DINSMORE,
President of Adams Express Co., &c.

C. W. BLAIR,
F. E. WHITFIELD,
CLARENCE A. SEWARD,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York, } ss. :

WILLIAM B. DINSMORE, being duly sworn, deposes and says, that he is the President of the Adams Express Company, and a shareholder therein, and is the petitioner herein ; that he has read the foregoing petition and that the matters and things therein contained are true to his own knowledge, except as to the matters therein stated to be upon information and belief, and as to those matters he believes it to be true.

WILLIAM B. DINSMORE.

Sworn to before me, this
day of November, 1882.

JOSEPH GUTMAN, Jr.,
United States Commissioner,
[L. S.] *Southern District of New York.*

SUPREME COURT OF THE UNITED STATES.

WILLIAM B. DINSMORE, as President of Adams Express Company, and a Shareholder therein,
Appellee,

vs.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
Appellant.

No. 994.

To MESSRS. BRITTON & GRAY,
Of Counsel for the Appellant,
Washington, D. C.

SIRS,—You will please take notice that on Monday, the 18th day of December, 1882, a motion, of which a copy is hereto annexed, together with a petition, of which a copy is also annexed, and a brief in support of said motion and of the prayer of said petition, of which brief a copy is also hereto annexed, will be presented to this Court at the opening of its session on that day, or as soon thereafter as counsel can be heard, and the said Court will then and there be asked, on behalf of the appellee, and upon the grounds in said motion and petition stated, and for the reasons in said brief assigned, to grant said motion and the prayer of the said petition, and to dismiss the appeal herein; or, in default of its so doing, that a writ of certiorari issue herein; and also to then and there accord to the appellee such other or further or different relief as to the Court may seem meet.

Dated November 15th, 1882.

Yours respectfully,
C. W. BLAIR,
F. E. WHITFIELD,
CLARENCE A. SEWARD,
Of Counsel for Motion.

UNITED STATES OF AMERICA, *District of Columbia*, } ss.:

, being duly sworn, deposes and says: That on the day of November, 1882, he personally served upon Messrs. Britton & Gray, at the City of Washington, in the District of Columbia, a copy of the foregoing motion and petition, as the same are hereinbefore printed, and also a copy of the two briefs hereto annexed, by delivering all of such copies to and leaving the same with them personally.

Sworn to before me, this day of November, 1882.

[L. S.] *United States Commissioner.*

SUPREME COURT OF THE UNITED STATES.

WILLIAM B. DINSMORE, as President of the Adams Express Company, and a Shareholder therein, *Appellee*,

vs.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *Appellant.*

No. 994.

BRIEF IN SUPPORT OF THE FOREGOING MOTION AND PETITION.

I.

The first ground of the motion for the dismissal assigned by the appellee is that the certificate appended to the transcript is not the certificate required by law.

Section 698 of the Revised Statutes provides as follows:

"Upon the appeal of any cause in equity * * * a transcript of the record as directed by law to be made, and copies of the proofs, and of such entries and papers on file as may be necessary on the hearing of the appeal, shall be transmitted to the Supreme Court."

The phrase, "a transcript of the record as directed by law to be made," must have some meaning. The inquiry arises—What law directs how the transcript shall be made?

This inquiry is answered in part by Rule 8 of this Court, which provides as follows:

"3. No cause will hereafter be heard until a complete record containing in itself, without references *aliunde*, all the papers, exhibits, depositions and other proceedings, which are necessary to the hearing in this Court, shall be filed."

The necessary inference from this provision would seem to be that the Clerk of the Court below must transmit a complete record, containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings which are necessary to a hearing in this Court, and that this Court will not exercise its jurisdiction as an appellate tribunal until a record containing what is specified in this rule shall have been filed.

But the phrase, "as directed by law to be made," may have a still further interpretation.

The Act of March 3, 1803 (2 *U. S. Stats. at Large*, 244), required:

"That, upon such appeal a transcript of the libel, answer, depositions and all other proceedings of what kind soever in the cause, shall be transmitted to the said Supreme Court."

The Act of February 26, 1853 (10 *U. S. Stats. at Large*, 163), provided that—

"In case of an appeal, copies of the proofs and of such entries and papers on file as may be necessary on the hearing of the appeal may be certified up to the appellate court."

It would seem, therefore, to be necessary that the Clerk below should certify that the transcript which he sends up contains a transcript of the "bill, answer, depositions and all other proceedings of what kind soever in the cause," and also "copies of the proofs."

If the transcript is required to contain the substance of what has been stated, it is clearly necessary that the certificate of the Clerk should authenticate the fact that the tran-

script does contain "a transcript of the record, as directed by law to be made." The certificate in the present case is fatally defective in that it does not comply with the requirements of the law. It simply certifies as follows:

"I, * * Clerk of the Circuit Court, * * * * do hereby certify the foregoing to be a true, full and perfect copy from the record of all the proceedings in the suit."

This is not a compliance with either the rule of the Court or with the statute. It omits all reference to what the rule and the statute so specifically prescribes shall be returned, viz., "exhibits, depositions, * * copies of the proofs."

Perhaps the difficulty arises from the fact that the Act of February 26, 1853 (10 *U. S. Stats. at Large*, 163), which was re-enacted as Section 750 of the Revised Statutes, provided as follows:

"In Equity and Admiralty cases, only the process, pleadings and decree, and such orders and memorandums as may be necessary to show the jurisdiction of the Court and the regularity of the proceedings, shall be entered upon the final record."

The Clerk of the Court below may have supposed that he was required to return only such matters as are specified in this section of the Revised Statutes, and that, as the Revised Statutes did not require the proofs and depositions to be entered upon the final record, it was not necessary, in making the transcript of such record, to annex thereto the proofs.

If the certificate be defective in not certifying that the transcript contains a transcript of the record "as directed by law to be made," and "copies of the exhibits, depositions and proofs," then the further inquiry arises—what is the remedy therefor?

That was answered by the opinion of this Court in the case of *Hodges* v. *Vaughn* (19 *Wall.*, 12), in which a certiorari was moved for upon the alleged diminution that the Clerk below had not appended to the transcript a certificate that the transcript contained the full record. The motion for the certiorari was denied, and leave was granted to the plaintiff in error to withdraw the transcript to enable him to apply to the Clerk of the Court below to append thereto the necessary certificate. In this case the motion was made on behalf of the plaintiff in error for the certiorari, and the relief granted was accorded to him.

It is supposed that the appellee is entitled to the same relief, or that, if not, it will be competent for this Court upon this branch of the motion to direct the appellant to withdraw the transcript to enable it to apply to the Clerk of the Court below to append thereto the necessary certificate. If this is done and the record thus corrected and its defects cured, it is immaterial at whose suggestion it is done, provided that the expense thereof falls upon the party whose duty it is to furnish a properly certified transcript.

II.

If the certificate annexed to the transcript is not to have the limited interpretation hereinbefore given to it, then its averment that the transcript is "a true, full and perfect copy from the record of all the proceedings in the suit" is not correct.

It appears from the transcript that the appellee gave notice in the Court below of his desire that the testimony in the cause should be taken orally, under and pursuant to the 67th Rule in equity as amended, and that the Court below appointed Mr. W. H. Rossington as examiner to take the proofs on behalf of the complainant, and that due notice of such appointment and of the time and place, when and where the complainant would proceed to take such testimony was given to the solicitors for the appellant.

It further appears that the depositions of eighteen witnesses were taken before Mr. Rossington on behalf of the appellee, and that the same, together with the various exhibits and certified copies thereto annexed, were returned by the Examiner to the office of the Clerk of the Court below, and were therein filed by such Clerk on the 1st of December, 1881, and still now remain so on file. The certificate is inaccurate, therefore, when it states that the transcript contains "a true, full and perfect copy from the record of the proceedings in the suit," if taking depositions and filing them with their appropriate exhibits and certified copies is a proceeding in the suit in the Court below.

This evidence was brought before the Court on the argument at St. Louis, in a printed volume containing 257 pages,

and copies thereof were furnished to the counsel in the Court below for the appellant.

This proof was used by the Circuit Court in making the decree appealed from, and is now being used by the Circuit Court for the purpose of enabling it to make, as the Court itself states in its decree, "a further decree in the suit."

The petition of the appellee, filed in the Court below June 8th, 1882, prays that the matters in dispute may be referred to a Master—

"With power * * * to use as evidence all the testimony heretofore taken in this cause, * * * and to report the same to this Court with all the evidence taken before him, or heard or considered by him."

The order made upon such petition gives the Master power—

"To use as evidence any and all testimony heretofore taken in the cause, * * * and that he accompany said report with all the evidence taken and considered by him."

The sixth paragraph of the second decree of June 8th, 1882, being the decree appealed from, is founded—in its statement of facts with regard to what the Adams Express Company had been previously paying—with regard to the contract between the Pacific Express Company and the appellant, and the effect thereof upon the business of the Adams Express Company—entirely upon the proofs in the case. These were findings of fact in the decree, which could have been based upon the proofs only.

The Clerk in his certificate states that the report of Mr. Rossington, containing the depositions of the witnesses named,

"Was filed December 1, 1881, and is now among the papers in said suit in the Clerk's office of said Court, endorsed 'No. 3,307.—Report of W. H. Rossington, filed December 1, 1881.' * * * I see no reason why the transcript should not contain said report and evidence, and it must have been my mistake in leaving it out of the transcript on appeal."

It is to correct this mistake and to bring up as a portion of the transcript the depositions, exhibits and proofs remaining on file in the Court below, that the appellee now asks that a writ of certiorari may be issued.

In the *United States* v. *Adams* (9 *Wall.*, 661), the Court said:

"This writ is properly used to bring up to the Court of error, on an allegation of diminution, out branches of the record or other docu-

ments and writings in the Court below, which have not been previously certified or sent."

In *Hodges* v. *Vaughn* (19 *Wall.*, 12), the Court said:

"A motion for certiorari is founded upon a suggestion of diminution, and is designed to bring up some part of the record left back and not included in the transcript."

The diminution in the transcript, viz., the omission to include therein copies of the depositions, proofs, and exhibits on file in the Court below, is stated in the petition, is verified by the transcript, and admitted by the certificate of the Clerk of the Court below; and, therefore, the appellee would seem to be entitled to have the omission supplied by the writ of certiorari.

III.

It is quite evident that the appellee, when the appeal is argued, will insist that the appellant had no lawful right to undertake to withdraw its answer after the proofs had been taken and closed, and to substitute a demurrer in lieu thereof. The appellee will then insist that, by the rules of this Court (*Rule* 66), when the general replication was filed, the cause was "to be deemed to all intents and purposes at issue" on the merits; that the appellant thereafter could not properly raise the questions of jurisdiction sought to be raised by the demurrer; nor could the appellant thereafter withdraw the statement of facts contained in the answer, and upon which the appellee relied in the Court below as part of his case.

It is unnecessary now to cite authorities upon this point. If, however, the appellee be right in the point, viz., that he has a vested right to have the cause tried upon the merits, after answer and replication filed and testimony taken, it will then be necessary for this Court to have before it the testimony upon which the appellee relied in the Court below, and upon which the Court below itself also relied in the sixth paragraph of the decree appealed from, as hereinbefore stated.

IV.

That the Court below did make certain findings of fact upon the evidence in the decree appealed from is further shown by the last paragraph of said decree, which states as follows:

"And the said defendant, excepting to all and singular the above findings, * * * prays an appeal of said cause to the Supreme Court of the United States."

Here is a specific exception to the "findings," which of necessity implies a finding of fact upon a consideration of the evidence.

Almost every paragraph of the opinion of Mr. Justice MILLER, and of the decree which is founded thereon, is a finding of fact upon the evidence.

The first paragraph of the decree appealed from shows this most conclusively, for it says:

"That the express business, as fully described and shown in the record, is a branch of the carrying trade which has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized so as to require the Court to take notice of the same as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads."

This finding was based upon the evidence, and so also were the other findings contained in the decree.

V.

The decree appealed from was not final.

Upon this point the appellee respectfully refers to the brief already filed in the case of *The Southern Express Company* vs. *The St. Louis, Iron Mountain and Southern Railway Company*, being No. 914 upon the docket of the present term of this Court. A copy of such brief has been served upon the counsel for the appellant in this suit, as appears by the affidavit of service hereto annexed, and a copy of such brief is also hereto attached.

There are, however, certain points of difference between

the present case and that of *The Southern Express Company* vs. *The St. Louis, Iron Mountain and Southern Railway Company*, and that of *The Southern Express Company* vs. *The Memphis and Little Rock Railroad Company* (as reorganized), being No. 879 of the present docket, to which it is proper to call attention.

1. In the decrees in the two other cases there occurs paragraph V., which is as follows:

"That it is the duty of the defendant to carry the express matter of the plaintiff's company, and the messengers or agents in charge thereof, at a just and reasonable rate of compensation, and that such rate of compensation is to be found and established as a unit, and is to include as well the transportation of such messengers and agents as of the express matter in their custody and under their control."

Precisely the same paragraph is to be found in the decree appealed from in the present case, and it is also there to be found as Paragraph V.

In the decree in the two other cases appealed from, there also occurred another paragraph, known as Paragraph X., which was as follows:

"X.—Whereas, it is alleged by complainant that, since the commencement of this suit and the service of the preliminary order of injuction herein, the defendant has, in violation of said injunction and of the rights of complainant, made unjust discriminations against the complainant, and has charged the complainant unjust and unreasonable rates for carrying express matter; therefore, it is ordered that complainant have leave hereafter to apply for an investigation of this and similar allegations, and for such orders in respect thereto as the facts, when ascertained, may justify, and for the appointment of a Master to take proof and report thereon."

It was upon these two paragraphs that the appellee in the Court below filed his petition, and obtained the modification of the so-called final decree in the other two cases, Nos. 879 and 914. The decree appealed from in the present case does not contain this Paragraph X. The reason therefor is obvious.

It appears from the transcript that the Adams Express Company, at the time of the commencement of this suit, was paying the railway company as compensation the sum of $175 per day. Before the hearing of the motion for an injunction on the 15th of March, 1881, the Pacific Express Company had made its advent upon the road, and was dividing the express business thereon with the Adams Express Company. The

question arose on the argument of the motion to continue the temporary restraining order—what compensation should the Adams Express Company pay *pendente lite*, as an arbitrary sum to be thereafter adjusted?—and thereupon the Court inserted this provision in the injunction order:

"It is further ordered that the plaintiff pay to the defendant for its services the same compensation as is now paid until the next term of this Court, subject to a reconsideration or readjustment of such compensation at said term, to relate back to the date of the original restraining order herein, or the date of this order, as the Court may then direct."

It is apparent from this that the question of a fair and reasonable compensation to be paid by the Adams Express Company, from the date of the commencement of the suit, was left open for further consideration and adjustment by the Court.

The defendant in its answer set up its contract with the Pacific Express Company, whereby the latter agreed to pay, over the same portions of the line as the Adams Express Company occupied, the sum of $225 per day, and one-half passenger fare for its agents or messengers.

The defendant also in its answer denied that the Adams Express Company was—

"Entitled to have all its express matter transported over the lines of the said defendant's railway on the payment of the cost of such transportation, or at such rates for freight or toll as may be just and reasonable and not in excess of those authorized by law. * * Avers that the contract which it entered into with the Adams Express Company was unjust and unreasonable, * * that the contract with the Pacific Express Company hereinbefore set forth was and is more just and remunerative to this defendant than said contract with the said Adams Express Company, and that the compensation agreed to be paid to this defendant by the said Pacific Express Company was just and reasonable and ought to be paid by any express company doing business over the defendant's line, * * * * that said contract is just and equitable * * * * and reasonable, legal and just."

The supplemental bill of the plaintiff avers that—

"The sum of $175 per day, as heretofore paid by the said Adams Express Company, was paid by it when it was in the sole enjoyment of the express business over the defendant's line, and was as large a sum as the said defendant could reasonably or justly demand for such sole enjoyment of its express facilities, * * that the sum of $225 per day, so nominated in the said contract with the said Pacific Ex-

press Company, is an advance of $50 per day, or for 313 working days in a year an advance of $15,650 per annum over the sum of $175 per day so heretofore paid by the said Adams Express Company, * * that the sum of $225 per day is not a just or reasonable sum for the Adams Express Company or any other company to pay, even for the sole enjoyment of express facilities over the defendant's line, nor is the same a just or reasonable sum for the Adams Express Company or any other express company to pay for such facilities, when the same and the business incident thereto are divided, as the same are now divided, between the two express companies, * * that the said contract with the said Pacific Express Company is an illusory one, and that the express business upon the defendant's line does not warrant or justify the undertaking or requirement to pay the said sum of $225 per day therein specified."

The prayer of the supplemental bill was—

"That the said defendant may be adjudged and decreed to receive for transportation express matter and messengers of the Adams Express Company at all its depots and stations, and transport the same to destination * * * for such just, lawful and reasonable compensation as this Honorable Court, in view of all the circumstances, may determine."

It is evident, therefore, that there was an issue between the parties under these pleadings. There were three questions of fact or of law.

1. Was the contract with the Pacific Express Company an actual *bona fide* contract, or was it an illusory one?

2. Ought the Adams Express Company to pay the $225 per day therein nominated?

3. What was a fair and reasonable compensation for the Adams Express Company to pay?

The Adams Express Company, in the depositions on file in the Court below, gave evidence tending to prove that the charge of $225 per day, over the 590 miles of the defendant's railway occupied by it, was neither just nor reasonable, and that to compel it to pay $225 per day would be to require it to pay at the rate of 22½ cents per mile per ton for all the express matter carried for it, and in addition thereto to pay one-half passenger fare for each agent or messenger.

It is further apparent that the decree appealed from does not undertake to decide either of these three questions of fact or of law. Such decree does state in the fifth paragraph that it is the duty of the defendant to carry the express matter and

the messengers and agents of the Adams Express Company at a just and reasonable rate of compensation, and

"That such rate of compensation is to be found as a unit, and is to include as well the transportation of such messengers and agents as of the express matter in their custody and under their control."

This obviously negatives the right of the appellant to charge, in addition to its charge for facilities, messenger fares, and states that the proper rule of charge is the unit one of a gross amount, to include as well the transportation of the messenger as the transportation of the express matter in his charge. But inasmuch as the decree says that "such rate of compensation is to be found as a unit," it obviously admits that, so far as the decree appealed from is concerned, such rate has not yet been found or established, but is to be determined by some action of the Court below hereafter.

The eighth paragraph of the decree appealed from confirms this view, because it states that it is the duty of the defendant to afford express facilities for such compensation as is reasonable and just, but leaves the resolution of that question—what is reasonable or just—to some further action by the Court.

2. Further. The sixth paragraph of the decree appealed from seems conclusively to admit that it is not and was not intended to be a final decree. Its language is this:

"That the said Adams Express Company is entitled to have, possess and enjoy a continuance of the said facilities and privileges for the conduct of its said express business on the lines of the defendant's railway, as the same are now had, possessed and enjoyed, until the further order or decree of this Court, at a rate not to exceed fifty per centum more than its actual rates."

No stronger language could have been used by the Court below to indicate that it had not lost its jurisdiction of the case, or that it still retained it for the purpose of determining what was a fair and reasonable compensation, than this phrase—

"That the said Adams Express Company is entitled to have, possess and enjoy a continuance of the said facilities until the further order or decree of this Court."

—obviously showing that the Court intended to make a further order or decree, and that the one appealed from was not regarded by it as final.

3. Why the Court did not regard it as final is shown by

the transcript. On the 8th of June, 1882, the appellee filed his petition to have the question, whether $175 per day was in excess of what should be paid, or what was a just and reasonable rate or basis of compensation, referred to a Master—

"In order to settle permanently what was and will be, up to the termination of the proceedings originated by this petition, a just and fair compensation for the services rendered and to be rendered, * * and to fix and determine what was and is a just and reasonable compensation to be paid by the Adams Express Company to the defendant for the use and enjoyment of the facilities and privileges accorded to it on the defendant's lines of railway since the commencement of this suit, and up to the conclusion of the proceedings before such special Master, * * * * and that upon the filing of the said report, and the consideration thereof by the Court, such decree may be made thereon as to the measure of compensation as may be just and equitable to both parties in this cause."

This obviously contemplated the retention of jurisdiction by the Court, the proceedings before the Master, and determination by him, and the filing of his report, and "such a decree thereon as to the measure of compensation as may be just and equitable."

On the same 8th day of June, 1882, the Court below made this decree:

"And now at this day, to wit, June 8, 1882, this cause coming on to be further heard upon the petition filed by the complainant herein, for the appointment of a special Master to take and state an account between the parties as to the compensation which should be and has been paid during the litigation and up to the final termination thereof, and to take and hear testimony in regard thereto, and the same having been fully considered by the Court, it is ordered, adjudged and decreed as follows":

It is very obvious from this recital, which was the act of the Court below, that the question of a fair and reasonable compensation from the commencement of the suit was not considered by the Court as having been passed upon or determined by it, and that such rate was to be fixed "up to the final termination" of the suit, thereby conceding that the suit had not then been finally terminated.

The recital also shows by the use of the words "ordered, adjudged and decreed," that the decree appointing the Master was a judgment or decree in as high a sense as the judgment or decree appealed from. This judgment or decree, after appointing the Master, and designating his duties—one of which

was to fix and determine what is a just and reasonable compensation to be paid by the Adams Express Company to the defendant for the use and enjoyment of the facilities and privileges accorded to it on the defendant's lines of railway since the commencement of this suit, and up to the conclusion of the proceedings before such special Master—further provided that upon the coming in of such report—

"Either party may have leave to apply to the Court for such further relief or decree thereon as to such measure of compensation as may be just and reasonable."

This was obviously a decree, but it was also upon its face an interlocutory decree. It find its place in the transcript as preceding the decree appealed from, and therefore throws light upon the intention of the Court in the decree appealed from in which it used this language:

"That the said Adams Express Company is entitled to have, possess and enjoy a continuance of the said facilities and privileges for the conduct of its said express business on the lines of the defendant's railway as the same are now had, possessed and enjoyed, and until the further order or decree of this Court, at a rate not exceeding fifty per centum more than its actual rates."

This statement of what occurred in the Court below on the 8th of June, 1882, discloses the reason why the decree appealed from did not contain Paragraph X. of the decrees in the other two cases. The petition having been filed before the entry of the decree appealed from, and the decree appointing the Master having also been made before the decree appealed from, it was unnecessary in the decree appealed from to insert such a provision reserving a right to file such petition, and to procure such a decree as was contained in the other two cases.

The two decrees, as has been said, are called "decrees," and both having been pronounced on the same day are to be taken as a part and parcel of the same proceeding in the Court below, and are to be considered as a unit. If they are to be considered as a unit, then they are obviously interlocutory only. If the last decree is to be considered alone, then it shows upon its face that it reserves jurisdiction in the Court below to make a further order or decree which should enable the appellee to have the full benefit of the exercise of the right upon the defendant's lines which the Court had accorded to him. Until the rate of compensation is fixed as a unit the

appellee cannot say whether he can or cannot realize any benefit from the decree appealed from, and, therefore, in order to give him the benefit of the decree appealed from to its just and full extent—if such extent is to include a just and fair compensation to the railway—he must have the decision of the Court upon the question of what the past, present and future rate is to be, and until that question is decided by the Court below that Court has not made a final decree which is appealable to this Court.

C. W. BLAIR,
F. E. WHITFIELD,
CLARENCE A. SEWARD,
Of Counsel for Motion.

November, 1882.